Rel: 12/19/2014

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-09-0998

State of Alabama

v.

Emanuel Aaron Gissendanner, Jr.

Appeal from Dale Circuit Court
(CC-01-350.60)

WELCH, Judge.

The State of Alabama appeals the circuit court's ruling granting Emanuel Aaron Gissendanner's Rule 32, Ala. R. Crim. P., petition for postconviction relief and setting aside Gissendanner's capital-murder conviction and sentence of death.

In 2003, Gissendanner was convicted of murdering Margaret Snellgrove during the course of a kidnapping and a robbery and of possessing or uttering a forged instrument.[1] He was sentenced to death. Gissendanner's convictions and sentence of death were affirmed on direct appeal. Gissendanner v. State, 949 So. 2d 956 (Ala. Crim. App. 2006), cert. denied, 949 So. 2d 956 (Ala. 2006), cert. denied, 549 U.S. 1222 (2007). This Court issued the certificate of judgment for Gissendanner's direct appeal on August 25, 2006.

In August 2007, Gissendanner filed a timely postconviction petition pursuant to Rule 32, Ala. R. Crim. P., attacking his conviction and sentence. He filed an amended petition in June 2009. In August 2009, the circuit court conducted an evidentiary hearing. On March 30, 2010, the circuit court, adopting a significant portion of Gissendanner's closing brief in support of relief, found that Gissendanner had been denied his constitutional right to the effective assistance of counsel, and it set aside his

[1]Gissendanner was also charged with murdering Snellgrove during the course of a rape; however, he was acquitted of that charge.

conviction and his sentence. The State appeals that ruling. See Rule 32.10(a), Ala. R. Crim. P.[2]

The circuit court set out the following facts surrounding Snellgrove's murder in its order sentencing Gissendanner to death:

> "On Friday, June 22, 2001, [Gissendanner] intentionally caused the death of Margaret Snellgrove by inflicting severe head and neck injuries to her. The assault occurred at the victim's home. On Saturday, June 23, 2003, neighbors and relatives became concerned about the victim, as she could not be located. She had missed several appointments on June 22 and on June 23. She was last seen June 21, 2001. The police were contacted and examination of the victim's home revealed that she had been assaulted in her carport. Hair and blood, as well as the victim's broken glasses and an earring were discovered in the carport. The victim's car, a 1998 Oldsmobile Ninety-Eight, was missing. No one witnessed the assault and there is no evidence of an accomplice in the case. [Gissendanner] had been to the victim's residence previously. He helped witness Reverend David Brown with yard work at her house for about three hours in March or April 2001.
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> "A witness testified that she saw a black guy driving an automobile matching the description of the victim's car at approximately 6:30 a.m. on the morning of June 22. The location where the witness

[2]Rule 32.10(a), Ala. R. Crim. P., provides that: "Any party may appeal the decision of a circuit court according to the procedures of the Alabama Rules of Appellate Procedure to the Court of Criminal Appeals upon taking a timely appeal as provided in Rule 4, Alabama Rules of Appellate Procedure."

saw the automobile was in close proximity to the victim's home. The witness could not identify the driver as [Gissendanner], but her attention was drawn to the vehicle because her sister-in-law had an automobile that looked the same.

"On the morning of June 22, [Gissendanner], driving the victim's vehicle, picked up his best friend, Bernard Campbell, nicknamed 'Nobbie,' and they went to Clio. [Gissendanner] told Nobbie that the car belonged to one of his girlfriends. In Clio [Gissendanner], driving the victim's automobile, picked up three females who knew both [Gissendanner] and Nobbie, and they rode around, drank beer, and smoked weed. [Gissendanner] was wearing a brown pair of Dickey [brand] pants, a red shirt and a white tee shirt. [Gissendanner] told the females that he had bought the car from an 'old white woman.' They all noticed a Bible in the car.

"Queen Esther Morris testified that she saw [Gissendanner] the morning of June 22 in the victim's car. [Gissendanner] told Morris that he was going fishing.

"Around 1:00 a.m. the morning of June 23 the victim's automobile was reported abandoned on property owned by Linda Russell. Upon checking the license plate it was confirmed to be the victim's missing automobile. [Gissendanner] testified that the automobile was rented to him by an individual named Buster he saw early Friday morning who was looking to buy some drugs. [Gissendanner] further testified that Buster gave him a check on the victim's account, asked him to cash it and said he would use the proceeds to buy drugs from [Gissendanner].

"Following the discovery of the victim's automobile, law enforcement began a search and investigation in the area for the victim's body. The car was examined and blood was discovered in the

trunk of the car, on the underside of the trunk lid. The blood was later determined to be that of the victim.

"Investigators searched a nearby abandoned trailer in which [Gissendanner] sometimes stayed. In the trailer they found several items belonging to the victim including a cell phone, the victim's purse and some papers taken from the stolen vehicle. Investigators also found some of [Gissendanner's] clothing in the trailer which matched the description of the clothing [Gissendanner] was wearing on Friday morning during his trip to Clio. The victim's bloodstains were found on the clothing.

"On Saturday evening, June 23, [Gissendanner] paid his former wife $100.00 to drive him to Montgomery to visit his sister. She did so. [Gissendanner] was there in Montgomery when he was identified as a suspect, and he returned voluntarily to the Ozark Police Department, where he was questioned. He denied any involvement in the death of the victim, but admitted to driving her automobile and cashing the victim's check at the SouthTrust Bank in Ozark.

"The body of Margaret Snellgrove was found with the use of a cadaver dog on June 27, 2001, near the area where the automobile was found abandoned and near the trailer where [Gissendanner's] clothes and the victim's belongings were found. The body was found in a ditch covered with tree limbs. It appeared to have been there for several days and was badly decomposed. An autopsy determined that Margaret Snellgrove died of severe head and neck injuries. When the body was found she was in her panties with her shirt and brassiere pulled up under her arms. Her breasts were exposed."

(Trial C.R. 140-43; footnotes omitted.)

Standard of Review

The State appeals the circuit court's order granting Gissendanner's Rule 32 petition. The circuit court specifically found that Gissendanner had been denied his constitutional right to the effective assistance of counsel at his capital-murder trial and sentencing hearing.

To prevail on a claim of ineffective assistance of counsel the petitioner must satisfy the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must show: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by the deficient performance. The Supreme Court in Strickland recognized that this test presents a mixed question of law and fact. 466 U.S. at 698.

> "The standard of review the Court applies to each of these questions is that 'both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' [Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052] at 2070 [(1984)]. Thus, we will not reverse the circuit court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous. ... The questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law, and we do not give deference to the decision of the circuit court."

State v. Pitsch, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

"When we review a circuit court's resolution of a Strickland [v. Washington, 466 U.S. 668 (1984),] claim, as we do here, we apply a mixed standard of review because both the performance and the prejudice prongs of the Strickland test present mixed questions of law and fact." Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004). "A claim of ineffective assistance of counsel is a mixed question of law and fact: we accept the trial court's factual findings unless clearly erroneous, but we independently apply the legal principles to the facts." Franks v. State, 278 Ga. 246, 250, 599 S.E.2d 134, 140 (2004). "On [an ineffective-assistance-of-counsel] claim we examine the record for supporting facts and apply those facts de novo to determine whether they demonstrate ineffective assistance of counsel." State v. Stephens, 46 Kan. App. 2d 853, 855, 265 P.3d 574, 576 (2011).

"Counsel's competence ... is presumed, ... and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not

sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986).

> "We begin our analysis with a rebuttable presumption that counsel is better positioned than the appellate court to judge the pragmatism of the particular case and that he made all significant decisions in the exercise of reasonable professional judgment. Delrio v. State, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992). The presumption may be rebutted by evidence of counsel's reasoning or lack thereof. See Jackson v. State, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). In the absence of evidence of counsel's reasons for the challenged conduct, the appellate court will assume a strategic motivation and will not conclude that the conduct was deficient unless the conduct was so outrageous that no competent attorney would have engaged in it. Garcia v. State, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001), cert. denied, 537 U.S. 1195, 123 S.Ct. 1351, 154 L.Ed.2d 1030 (2003); see Thompson v. State, 9 S.W. 3d 808, 814-15 (Tex. Crim. App. 1999)."

Sanders v. State, 346 S.W.3d 26, 34 (Tex. Crim. App. 2011). See also People v. Solmonson, 261 Mich. App. 657, 663, 683 N.W.2d 761, 765 (2004) ("Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.").

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 1485 (2010). "Ineffective assistance of counsel (IAC) claims, even when reviewed de novo, are subject to a standard that

packs its own internal layer of deference." French v. Carter, 828 F. Supp. 2d 1309, 1323 (S.D. Ga. 2012).

With these principles in mind we review the claims raised by the State in its brief to this Court.

I.

The State first argues that the circuit court erred in finding that it violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose exculpatory information or the entire file of State handwriting expert Steven Drexler, which contained handwriting exemplars executed by Buster Carr and Gissendanner.

On appeal, the State argues that Gissendanner's Brady claim was precluded pursuant to Rule 32.2(a), Ala. R. Crim. P., because it could have been, but was not, raised at trial or on direct appeal, that the State pleaded this ground of preclusion in the circuit court, that once the procedural ground was pleaded Gissendanner had the burden of disproving its existence by a preponderance of the evidence,[3] and that

[3]The Alabama Supreme Court has recently stated: "[A] dismissal of a Rule 32.1(a) petition on the ground that the petitioner has failed to affirmatively plead the absence of facts sufficient to sustain a defense of preclusion under Rule 32.3 is error." Ex parte Beckworth, [Ms. 1091780, July 3,

Gissendanner failed to meet his burden of proving that this claim was not procedurally barred.

In granting relief on this claim, the circuit court made the following findings:

> "'Open file discovery' was ordered from the State and was defined as any and all evidence obtained from the State's investigation of this case through any agency or individual and in any form. State expert Steven Drexler's full handwriting report was never turned over to defense counsel. It was subsequently obtained through discovery in this Rule 32 proceeding by his counsel in March 2009 after their direct contact with Mr. Drexler. The full report finally obtained contains more than 30 model checks each written out by Gissendanner, Buster Carr, and Buster Carr's wife, Peggy. Under this court's trial discovery order, the State had an obligation to turn over the evidence collected from Gissendanner and Buster Carr.
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> "....
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> "The State's failure to turn over this key exculpatory evidence of Drexler's file and Buster's writing samples is particularly significant, because the forged check was the main piece of evidence used to convict Gissendanner of possession of a forged instrument in the second degree, for which he received a life sentence, and was also key evidence in the State's murder case against him."

(C.R. 1181-83.)

2013] ___ So. 3d ___, ___ (Ala. 2013).

To establish a Brady violation the petitioner must show: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defendant; and (3) that the evidence was material to the issues at trial. Johnson v. State, 612 So. 2d 1288, 1293 (Ala. Crim. App. 1992). The record of Gissendanner's trial shows that counsel was aware of the handwriting exemplars that had been furnished by Carr and Gissendanner.[4] Steve Drexler was questioned about handwriting samples of Margaret Snellgrove, Jimmy Lee "Buster" Carr, Emanuel Gissendanner, and Peggy Carr. (Trial R. 1312.) Gissendanner's counsel even stipulated that the samples had been written by the individuals identified as their authors. (Trial R. 1313.) Counsel knew at trial of the existence of the writing exemplars and, in fact, stipulated to their authenticity.

Moreover, during the postconviction hearing, neither of Gissendanner's attorneys was asked whether he was in possession of Steve Drexler's entire file before Gissendanner's trial. However, counsel did testify that he

[4]We have taken judicial notice of the record of Gissendanner's direct appeal. See Hull v. State, 607 So. 2d 369, 371 (Ala. Crim. App. 1992).

received a copy of Drexler's report. (R. 58.) Nor was any other testimony presented that the State, in fact, failed to furnish these documents during discovery. Gissendanner failed to prove that this evidence was, in fact, suppressed by the State. The circuit court erred in granting relief on this claim.

II.

The State next argues that the circuit court erred in finding that Gissendanner was denied the effective assistance of counsel during the guilt phase of his capital-murder trial. Specifically, the State argues that the circuit court applied incorrect legal standards when evaluating Gissendanner's claims, that the court ignored the basic legal principle that counsel's conduct is presumed effective and reasonable, that the court reduced the requirements for establishing prejudice, and that the court improperly found ineffective assistance of counsel based on a record that contained no reasons for counsel's actions and was silent.

As stated above, to prevail on a claim of ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient, and (2) that he was

prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

Strickland, 466 U.S. at 689.

> "The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland [v. Washington], [466 U.S. 668,] 104 S.Ct. [2052] at 2065 [(1984)]; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992)('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). We recognize that '[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.' Strickland,

> 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)."

Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (footnote omitted).

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."

Strickland, 466 U.S. at 691.

> "It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record. Indeed, 'trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.' Rylander v. State, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). This is so because it is presumed that counsel acted reasonably:
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> > "'The presumption impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced. "Counsel's competence ... is presumed, and

> the [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2588, 91 L.Ed.2d 305 (1986) (emphasis added) (citations omitted). An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." Williams [v. Head,] 185 F.3d [1223,] 1228 [(11th Cir. 1999)]; see also Waters [v. Thomas,] 46 F.3d [1506,] 1516 [(11th Cir. 1995)] (en banc) (noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial indicate that counsel exercised sound professional judgment).'
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> "Chandler v. United States, 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000). '"If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."' Dunaway v. State, [Ms. CR-06-0996, December 18, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007))."

Broadnax v. State, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013).

> "'Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.' Provenzano v. Singletary, 148 F.3d 1327,

> 1332 (11th Cir. 1998). Accord, e.g., Spaziano [v. Singletary], 36 F.3d [1028] 1040 [(11th Cir. 1994)] ('[T]he more experienced an attorney is, the more likely it is that his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances.') (quoting Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir. 1989)); Birt v. Montgomery, 725 F.2d 587, 600 (11th Cir. 1984) (en banc)."

Williams v. Head, 185 F.3d 1223, 1228-29 (11th Cir. 1999). "Our point is a small one: Experience is due some respect." Chandler v. United States, 218 F.3d at 1316 n.18.

More recently, the United State Supreme Court reiterated the long-established principle that counsel's actions during the course of representing a defendant are presumed reasonable:

> "Recognizing the 'tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence,' [Strickland v. Washington, 466 U.S. 668 (1984)], the Court established that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' [Strickland, 466 U.S.] at 690. To overcome that presumption, a defendant must show that counsel failed to act 'reasonably considering all the circumstances. [446 U.S.] at 688. The Court cautioned that '[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.'"

Cullen v. Pinholster, ___ U.S. ___, ___, 131 S.Ct. 1388, 1403 (2011).

Thus, "[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we 'will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.'" Smith v. State, 392 S.W.3d 190, 197 (Tex. Crim. App. 2012).

> "[A]n otherwise valid conviction will not be overturned merely because the defendant is dissatisfied with his or her counsel's exercise of judgment during the trial. State v. Coruzzi, 189 N.J. Super. 273, 319-20, 460 A.2d 120 (App. Div.), certif. denied, 94 N.J. 531, 468 A.2d 185 (1983). The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt."

State v. Castagna, 187 N.J. 293, 314, 901 A.2d 363, 375 (2006).

Contrary to the assertion made in the dissent, the trial court's findings regarding prejudice suffered by a defendant as a result of counsel's deficient performance is not to be afforded "considerable weight" upon appellate review. Judge Joiner's dissent cites State v. Gamble, 63 So. 3d 707, 721 (Ala. Crim. App. 2010), Washington v. State, 95 So. 3d 26, 53

(Ala. Crim. App. 2012), and Francis v. State, 529 So. 2d 670, 673 n.9 (Fla. 1988), for the proposition that because the same judge presided over both the trial and the Rule 32 proceedings, we must afford "considerable weight" to the Rule 32 court's finding of prejudice in an ineffective-assistance-of-counsel claim. Judge Joiner's interpretation of those cases is too broad. Those cases concerned a postconviction claim of ineffective assistance of counsel during the penalty phase of a capital trial alleging counsel's failure to present additional mitigation evidence. In each case the same judge presided over both the original trial and the postconviction proceeding and that judge found that the additional mitigation evidence presented at the postconviction hearing would not have changed that judge's decision regarding the result of the weighing of the aggravating circumstances and the mitigating circumstances and, thus, would not have changed the sentence ultimately imposed by that judge. In Gissendanner's case, the additional evidence in question would have been presented to the jury during the guilt phase of the trial for the jury's use in determining whether a reasonable doubt as to Gissendanner's guilt existed. Thus, "[t]he questions of

whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law, and we do not give deference to the decision of the circuit court." State v. Pitsch, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985). Therefore, "[t]he standard of review on appeal in a postconviction proceeding is whether the trial judge abused his discretion when he denied the petition." Elliot v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992), citing Ex parte Heaton, 542 So. 2d 931 (Ala. 1989). Judge Joiner and Judge Burke further argue in their dissents that we must give deference to the judge who presided over the trial proceedings because he or she was in the courtroom, whereas this Court is reviewing a "cold record." However, the allegations involving counsel's performance in this case concern counsel's actions that occurred outside the record -- actions that were not within the personal knowledge of the trial judge.

Gissendanner was represented at trial by attorneys Bill Kominos and Joseph Gallo. Both attorneys testified at the postconviction evidentiary hearing. Kominos testified that he had been practicing law since 1979, that over 50 percent of his practice was criminal defense, that he had represented

defendants in five or six capital-murder cases, that he was appointed to represent Gissendanner in June 2001, that he was in charge of the guilt phase, that Gallo was in charge of the penalty phase, and that he had asked for funds for an investigator and that that motion had been granted. Gallo testified that he had been practicing law for 20 years, that he was appointed as cocounsel in Gissendanner's case in 2001, that approximately 30 percent of his cases were criminal cases, and that he was in charge of the penalty phase.

Kominos further testified that in preparing for Gissendanner's trial he frequently spoke with Gissendanner and Gissendanner's father. Their strategy was that Gissendanner could not have murdered Snellgrove because he was in Johntown -- miles away from the scene of the murder. Gallo testified that in preparation for the penalty phase he spoke to 10 or 12 people. Counsel's strategy at the penalty phase was to humanize Gissendanner and to argue residual doubt.

A.

First, the State argues that the circuit court erroneously concluded that Gissendanner's attorneys were per

se ineffective based on the number of hours they billed for work they performed on Gissendanner's case.

The circuit court stated: "Kominos documented at most [9] hours spent with Gissendanner, ... Gallo spent 7.7 hours with Gissendanner, and ... counsel only spent 3 hours interviewing potential witnesses." (C.R. 1121.) The attorney-fee declarations submitted at the postconviction hearing show that Kominos billed for 186 hours and Gallo billed for 162 hours. (Suppl. C.R. 63; 263.) The circuit court found that counsel's performance was per se deficient based solely on the time Gissendanner's attorneys documented on their fee sheets even though counsel testified at the postconviction hearing that they both spent time on the case that was not reflected on those time sheets.

Judge Joiner's dissent contends that contrary to the assertion in this opinion, the circuit court did not find defense counsel's performance to be per se deficient based on the amount of time spent investigating the case as reflected on the fee-declaration sheets. ___ So. 3d at ___. The dissent contends that the circuit court found that "the lack of time [counsel] spent investigating Gissendanner's case as reflected

in his trial counsels' fee-declaration sheets" was evidence establishing its finding "that Gissendanner's trial counsel were deficient because his trial counsel failed to conduct a reasonable investigation into Gissendanner's defense." ___ So. 3d at ___. As stated above, the circuit court's order sets forth the amount of time counsel spent preparing Gissendanner's case as reflected in the attorney's fee-declaration sheets. The circuit court then listed potential witnesses alleged to be favorable to Gissendanner that would have been discovered in the course of a reasonable investigation. The circuit court cites caselaw and The American Bar Association guidelines regarding counsel's duty to investigate. In its conclusion, the circuit court stated: "[a]pplying the above cited law to the finding of facts this court concludes that defense counsel's performance was deficient." (C. 1127.) It appears that the circuit court found that the individuals listed in the order were not interviewed by defense counsel in preparation for trial because the fee sheets reflect that counsel spent an inadequate amount of time preparing the case for trial. The record does not reflect that defense counsel was asked at the

Rule 32 hearing why those witnesses were not called to testify at Gissendanner's trial or asked whether the defense strategy would have been different had counsel known the potential testimony that those individuals would have presented at trial. The circuit court's reliance on the alleged small quantity of time reflected on the fee sheet as proof that counsel's investigation was inadequate equates to finding that the fee sheet presented a case of per se deficient performance by counsel. Thus, it is not, as the dissent asserts, a "mischaracterization of the circuit court's order" to say that the circuit court found that counsel's performance was per se deficient based on the time Gissendanner's attorneys documented on their fee sheets as having expended on the case.

Rarely does a reviewing court conclude that counsel's actions are per se ineffective.

> "Most ineffective assistance of counsel claims arise under Strickland v. Washington and require a showing that (1) counsel's performance was deficient, and (2) there was prejudice. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Fewer claims arise under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), and are labeled 'per se' claims.
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> "'The Supreme Court has held that under certain egregious circumstances, however,

> a defendant can assert a "per se" ineffective assistance claim in which the court will presume prejudice. Those circumstances include the actual or constructive denial of assistance "when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding."
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> "Short v. United States, 471 F.3d 686, 693 (6th Cir. 2006) (citing Cronic, 466 U.S. at 658-59). Per se claims are generally harder to prove than Strickland claims and apply to especially egregious behavior by counsel. See Moss v. Hofbauer, 286 F.3d 851, 859-60 (6th Cir. 2002) (noting that per se claims require proof of the 'complete absence of counsel' while Strickland claims require an 'individualized inquiry into defense counsel's performance')."

Caldwell v. Lewis, 414 Fed. App'x 809, 814 (6th Cir. 2011) (not selected for publication in Federal Reporter).

"Counsel's time records might provide a basis for further inquiry but the records do not, standing alone, prove either that counsel was incompetent or that the incompetence prejudiced defendant." United States v. Raineri, 42 F.3d 36, 44 (1st Cir. 1994). "The effectiveness of counsel cannot be ascertained solely by the amount of time afforded a defendant to prepare his defense." United States v. Pearson, 798 F.2d 385, 388 (10th Cir. 1986).

> "[T]he appellant contends counsel were ineffective in preparing and investigating this case. To support this contention, she relies upon trial

> counsel's time sheets which were submitted for compensation; in essence, she argues that counsel did not log enough hours in this death penalty case. At the post-conviction hearing, each of appellant's counsel exhibited extreme difficulty remembering their involvement in this case that occurred nearly ten years before this hearing. Since the original trial, one of the attorneys lost his case file in an office fire. Additionally, [cocounsel] testified that the time recorded on his time sheets was 'way short' of the actual time he spent working on the case. As the State argues, the entire record of the trial proceedings must be examined to determine whether the appellant received effective assistance of counsel. See e.g., Hopkinson v. Shillinger, 866 F.2d 1185, 1217 (10th Cir. 1989), cert. denied, 497 U.S. 1010, 110 S.Ct. 3256, 111 L.Ed.2d 765 (1990), overruled on other grounds by Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed. 2d 193 (1990) (defendant must show specific errors, not solely based upon amount of time afforded to attorney to prepare defense) (citing United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 2043, 80 L.Ed.2d 657 (1984) and United States v. Pearson, 798 F.2d 385, 388 (10th Cir. 1986)). Therefore, the appellant's insistence that the length of time counsel spent on the case is not dispositive of the issue."

Owens v. State, 13 S.W.3d 742, 754-55 (Tenn. Crim. App. 1999). "We decline to find ineffective assistance based on the time sheets alone ...." Bower v. Quarterman, 497 F.3d 459, 469 (5th Cir. 2007). The circuit court erred in finding that Gissendanner's attorneys were per se ineffective based on the amount of time documented on their attorney-fee declarations.

The circuit court also found, in this section of its

order, that Gissendanner's attorneys were per se ineffective for failing to interview all of Gissendanner's family members. There is no per se rule that failing to talk to a defendant's family members constitutes ineffective assistance. As the United States Court of Appeals for the Eleventh Circuit stated in Williams v. Head, 185 F.3d 1223 (11th Cir. 1999):

> "[T]he Supreme Court has told us in no uncertain terms that '[t]here are countless ways to provide effective assistance in any given case,' and that '[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.' Strickland [v. Washington], 466 U.S. [668] at 689-90, 104 S.Ct. at 2065-66 [(1984)]. That is why there are no 'rigid requirements' or per se rules in this area, and why the inquiry is focused on reasonableness given the circumstances counsel faced at the time."

185 F.3d at 1237-38.

The circuit court erred in concluding that Gissendanner's attorneys were per se ineffective based on counsel's failure to interview Gissendanner's entire family.

B.

The State next argues that the circuit court erred in finding that counsel was ineffective for failing to review certain documents in the State's file. Specifically, the

State asserts that the circuit court incorrectly found that counsel was ineffective for failing to review the following evidence: (1) photographs of the abandoned trailer in which Gissendanner sometimes stayed; (2) forensic documents that showed that the State did not perform tests on items found at the trailer; (3) a log of the inventory of the items found at the trailer; (4) a fingerprint report on the trailer; (5) a fingerprint report of the victim's carport, garage door, and a padlock; (6) a corrected fingerprint report on the victim's automobile; (7) various reports that showed that trace evidence had not been tested; (8) the autopsy report; (9) photographs of the trunk of the victim's automobile; (10) a transcript of a police interview of Shirley Hyatt; (11) a transcript of the preliminary hearing; (12) a police report that showed that Gissendanner's clothes were found on the front porch of the trailer; (13) a transcript of police interviews with Felicia Caple, Shanteena Richards, and Hattie Richards; and (14) a transcript of Buster Carr's interview with police.

The State argues on appeal that the circuit court presumed that counsel had not reviewed the above-listed items

without any evidence that counsel had, in fact, failed to examine them.

> "Under our system of justice, the criminal defendant is entitled to an opportunity to explain himself and present evidence on his behalf. His counsel should ordinarily be accorded an opportunity to explain her actions before being condemned as unprofessional and incompetent."

Bone v. State, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). "[T]his court will not infer a failure to investigate a defense by counsel from a silent record." State v. Skatzes, 104 Ohio St. 3d 195, 232, 819 N.E.2d 215, 259 (2004).

Neither Kominos nor Gallo was asked whether he specifically reviewed the above-listed evidence and, if so, why he did not present that evidence at Gissendanner's trial. Postconviction counsel merely asked Kominos about a motion for a continuance that he had filed because one of the stated reasons for the continuance was that counsel anticipated that independent testing and analysis were to be conducted on certain evidence. The following occurred during the direct examination of Kominos:

> "[Postconviction counsel]: And so you are at least telling the Court at that time that you were going to or considering having independent testing and analysis performed and fingerprinting identification?

"[Kominos]: Joe Gallo and I discussed the possibility of doing that, and that was one of the reasons we asked for a continuance.

"[Postconviction counsel]: And ultimately there was no expert retained to conduct any independent testing and analysis on the testing analysis and fingerprinting identification made by the State; is that right?

"[Kominos]: That's right.

"....

"[Postconviction counsel]: ... Do you recall that the State turned over files to you as part of the work that you were doing in defense of Mr. Gissendanner?

"[Kominos]: If by files you mean documents, exhibits, photographs, reports, and items such as that, yes.

"[Postconviction counsel]: Yes, sir, by the police statement, witness statements that the police had?

"[Kominos]: Yes.

"[Postconviction counsel]: Yes, sir, you had all those and they were available to you?

"[Kominos]: Well, you know, they were coming in. It wasn't just one big bundle a month before the trial. No, they were coming in and -- as they were being developed by the State, I would imagine.

"[Postconviction counsel]: Yes, sir. And I'm trying to maybe rush this through a little too quickly here. I'm just trying to get to the point that what the State turned over to you --

"[Kominos]: Okay.

> "[Postconviction counsel]: -- you had available to you in the development of your defenses for Mr. Gissendanner?"

(R. 54-58.)

Gissendanner presented no evidence indicating that counsel failed to examine the documents the State furnished to defense counsel during discovery. Thus, Gissendanner failed to meet his burden of proof in regard to this claim. "When there is no evidence that trial counsel failed to examine evidence, [the petitioner] has failed to establish that [he] received ineffective assistance." State v. Abramson, 146 Wash. App. 1001 (2008) (not reported in P.3d).

Moreover, a review of the record of Gissendanner's trial clearly shows that counsel were prepared and had reviewed the State's evidence against Gissendanner. Counsel vigorously cross-examined the State's fingerprint expert, challenged the lack of forensic evidence connecting Gissendanner to the robbery/murder, obtained an acquittal of the rape/murder charges, and presented a witness in the defense's-case-in-chief who testified that he discovered a pile of clothes in the abandoned trailer after the trailer had been searched by police. The record of Gissendanner's trial does not support

the circuit court's findings regarding this claim. Gissendanner failed to rebut the strong presumption that his counsel's actions were reasonable. The circuit court erred in granting relief on this claim.

C.

The State next argues that the circuit court erred in finding that Gissendanner's attorneys were ineffective for failing to investigate and to present various alibi witnesses during the guilt phase.[5]

"The decision not to call a witness is not per se ineffective assistance." United States v. Jones, 785 F. Supp. 1181, 1183 (E.D. Pa. 1992).

> "The failure to call a possible alibi witness is not per se ineffective assistance of counsel. Commonwealth v. Owens, 454 Pa. 268, 274, 312 A.2d

[5]"Alibi witness" is defined as: "A witness who testifies that the defendant was in a location other than the scene of the crime at the relevant time; a witness who supports the defendant's alibi." Black's Law Dictionary 1838 (10th ed. 2014). We question whether all the named witnesses were true alibi witnesses. Indeed, the victim's body was not discovered until June 27, 2001. The coroner testified that the victim had been dead "for a while" and that her body was in an advanced state of decomposition -- the coroner did not testify to an exact date of death. (Trial R. 1130-31.) It was the State's theory of the case that Gissendanner killed the victim in the early morning hours of June 22, 2001. The alleged alibi evidence in this case was not true alibi evidence.

> 378, 381-382 (1973); Commonwealth v. Olivencia, 265 Pa. Super. 439, 402 A.2d 519, 523 (1979); Commonwealth v. Washington, 239 Pa. Super. 336, 344, 361 A.2d 670, 674 (1976). It is only where it is shown that a defendant has informed his attorney of the existence of an alibi witness and trial counsel, without investigation and without adequate explanation, fails to call the witness at trial that counsel will be deemed ineffective. Commonwealth v. Adams, 465 Pa. 314, 321, 350 A.2d 412, 416 (1976); Commonwealth v. Owens, supra 454 Pa. at 272, 312 A.2d at 381. Thus, to prevail, a defendant must establish that defense counsel knew of the existence of the alibi witness and that the alibi testimony would have been beneficial to his or her case. Commonwealth v. Adams, supra; Commonwealth v. Yarbough, 248 Pa. Super. 356, 361-362, 375 A.2d 135, 138 (1977)."

Commonwealth v. Williams, 274 Pa. Super. 464, 472-73, 418 A.2d 499, 503-04 (1980). "As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias." Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995).

"Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact." Chandler v. United States, 218 F.3d at 1320.

At trial, Gissendanner testified in his own defense that on the evening of June 21, 2001, he was with his brother, Jason Covington, and a cousin, Kevin McDaniel, at a birthday

party in Johntown. They left the party at 11:00 p.m., he said, and they dropped him off at his father's house. He could not get into the house, he said, because the door was locked, so he slept in his brother's Jeep Cherokee sport-utility vehicle in the front yard. Gissendanner testified that at around 7:00 or 7:30 the next morning, June 22, 2001, he got up and went into his father's house to see if his younger brother had any cigarettes. Gissendanner did not testify whether he saw or spoke to anyone in his parent's house that morning. Because his brother was not at his parent's house, he said, he walked down the road to another brother's house. No one came to his brother's door so he started walking back to his parent's house when a "white guy" he knew as "Buster" drove by in a white Oldsmobile automobile. Buster pulled up beside him and asked him for drugs. He told Buster that he did not have any drugs with him. Buster asked him if he wanted to rent the car for the day. Gissendanner testified that he gave Buster $50 so that he could use the Oldsmobile for the day. Gissendanner said that he noticed something like mud on the back bumper of the car, and he took a sock from his pocket and wiped it off. He said that Buster

told him that he had hit a dog with the car. He drove the car around for the day and the car kept stalling, so he left the car in the front yard of a friend's house. The car was towed. The next morning, he said, Buster asked him to cash a check for him. He said, that the check was blank and that Buster filled in the amount and the payee. The check was on Snellgrove's account and was made out to Gissendanner for $927. Gissendanner testified that he paid a friend to take him to SouthTrust Bank so that he could cash the check, but the check was not signed and the teller would not cash the check. He went back to where Buster told him to meet him, and Buster took the check inside the house and came back with it signed. Gissendanner went back to the bank and cashed the check. He said that he gave Buster $950 by mistake. Gissendanner identified the clothes found in the trailer as his but said that he put the clothes in a white bucket on his parents's front porch and that he did not put those clothes in the trailer.

Defense counsel also presented the testimony of Butch Jones, an officer with the Dale County Sheriff's Department. Jones testified that in June 2001 he was helping search for

the victim's body and that the day before Snellgrove's body was discovered, and when Gissendanner was in police custody, he went to the abandoned trailer. He said that he searched the trailer and found a pile of clothes -- sneakers, pants, a t-shirt, a red shirt, and underwear -- in the bathroom. He telephoned the Ozark Police Department. The police were surprised, Jones said, because they had already searched the trailer and had found no clothes. (Trial R. 1347.)

Albert Sitz testified that in June 2001 he was working for Carr Tree Service in Dothan. The company was owned by two brothers, he said, Bobby and Jimmy Carr. Jimmy was also known as "Buster." Sitz testified that before police discovered the victim's body, Buster told him that if the police wanted to find her body they would need to go to Ewell by a pond because she was covered with bushes.

1.

First, the State argues on appeal that the circuit court erred in finding that Gissendanner was denied the effective assistance of counsel because Kominos and Gallo failed to interview and present the testimony of Joshua "Anton" Gissendanner -- Gissendanner's younger brother.

At the postconviction evidentiary hearing, Anton testified that on the morning of the day the State alleges that Snellgrove was murdered he drove to his parent's house at around 7:00 a.m. to check his mail. On the way there, he said, he saw Buster Carr in Snellgrove's car. His father was getting ready for work when he arrived at his parent's house, and he saw Gissendanner and gave him a cigarette. When he came back to his parent's house after dropping his daughter at school, he said, he and Gissendanner smoked some marijuana. While he and Gissendanner were at his parent's house Buster drove Snellgrove's car into the yard. He said that Buster gave Gissendanner money and Gissendanner gave him drugs. Buster left and came back a little while later and asked if Gissendanner would let him pawn Snellgrove's car in exchange for drugs.

Postconviction counsel did not ask either of Gissendanner's trial attorneys whether they had spoken to or were aware of the testimony Anton presented at the postconviction evidentiary hearing. Moreover, Anton's postconviction testimony was inconsistent with Gissendanner's sworn trial testimony. Gissendanner testified that on the

morning of the day the State alleges Snellgrove was murdered he went into his parent's house and his brother was not there. He also testified that when he met Buster Carr that day he was alone.

> "Counsel's duty is 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' Strickland [v. Washington], 466 U.S. [668] at 691, 104 S.Ct. 2052 [(1984)]. 'The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions,' and 'what investigation decisions are reasonable depends critically on such information.' Id. '[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.' Id."

Felts v. State, 354 S.W.3d 266, 277 (Tenn. 2011).

State and federal courts have found an attorney's performance reasonable and effective when the attorney failed to present evidence that contradicted the client's statements:

> "Claims of ineffective assistance of counsel reach constitutional dimension only if such representation probably affected the outcome of the trial, and it is the defendant's burden to so demonstrate (People v. Hanrahan (1985), 132 Ill. App. 3d 640, 87 Ill. Dec. 892, 478 N.Ed.2d 31.) Given that any alibi testimony would have contradicted [the defendant's] testimony at trial, such could hardly be the case. We conclude, therefore, that [the defendant's] allegations, even if true, do not sufficiently

> demonstrate a substantial deprivation of his right of effective assistance of counsel."

`People v. Barr, 200 Ill. App. 3d 1077, 1081, 146 Ill. Dec. 815, 818, 558 N.E.2d 778, 781 (1990). "Trial counsel cannot be found ineffective for failing to pursue a trial strategy that is in direct conflict with his client's sworn testimony." Commonwealth v. Laird, 555 Pa. 629, 645-46, 726 A. 2d 346, 354 (1999).

> "We have examined the affidavits of the two alibi witnesses, submitted in support of the motion for a new trial, and have observed that they conflict in at least one important particular with appellant's testimony at the trial. Hence, we conclude trial counsel acted wisely in not calling the affiants as witnesses, and so gave effective assistance in that respect."

Gray v. United States, 299 F.2d 467, 468 (C.A.D.C. 1962).

> "Knowing what the testimony of [the defendant's] father and uncle, and [a friend] would be, [the defendant's] trial attorney purposefully chose not to present an alibi defense. The attorney stated that his experience taught him that alibi testimony from family members is seldom persuasive, and that a bad alibi defense is often worse than no alibi defense at all. An attorney's deliberate failure to call witnesses whose testimony the attorney fears might actually hurt his or her client's defense is a proper strategic and tactical decision and cannot be a basis for a claim of ineffective assistance of counsel. See Rodden v. State, 795 S.W.2d 393, 396 (Mo. banc 1990), cert. denied, 499 U.S. 970, 111 S.Ct. 1608, 113 L.Ed.2d 670 (1991)."

State v. Borders, 844 S.W.2d 49, 55 (Mo. App. 1992).

This Court has considered a claim that a defendant's attorneys were ineffective for failing to present an alibi defense when the alibi conflicted with the defendant's testimony. In declining to find counsel ineffective, this Court stated:

> "In appellant's petition there is an affidavit signed by one James Earl Thomas and witnessed by three persons who have prisoner identification numbers, which states:
>
> > "'I came by Robert Lee Traylor house on May 27, 1981, around 11:30 or 12:00 o'clock, and do know for a fact that Robert Lee Traylor could not been involved in a robbery cause I was in his presence from about 12:00 o'clock till he was arrested that night, I would have testified to this fact if I had been called to court.'
>
> "The statement is directly contrary to the testimony elicited at trial from the appellant himself, who stated on direct examination that he was alone during this period. The testimony of Officer McWhorter and appellant established that appellant was alone when arrested.
>
> "In Strickland, 104 S.Ct. at 2066, the Court stated:
>
> > "'The reasonableness of counsel's action may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by

> the defendant.... And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.'
>
> "Assuming that Mr. Thomas, if called, would have testified as stated, such testimony would have contradicted both the testimony of appellant and that of Officer McWhorter. Such contradictions would be extremely harmful to appellant's defense. We view counsel's failure to call Mr. Thomas as sound trial strategy, if in fact counsel knew of the existence of Thomas at the time."

Traylor v. State, 466 So. 2d 185, 189 (Ala. Crim. App. 1985).

In granting relief on this claim, the circuit court failed to consider the entire record and Gissendanner's own sworn statements. As the United States Supreme Court stated in Strickland: "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. "Each case should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record." Hebert v. State, 864 So. 2d 1041, 1044 (Miss. Ct. App. 2004).

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are

> reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster [199 U.S. App. D.C. 359] 624 F.2d [196], at 209-210 [(1976)].' Strickland, supra 104 S.Ct. at 2066-2067."

Dunkins v. State, 489 So. 2d 603, 607 (Ala. Crim. App. 1985) (emphasis added).

As Strickland cautions, to properly assess a claim of ineffective assistance of counsel it is imperative that a defendant present evidence concerning what the defendant told his attorneys. Here, the circuit court assumed that Gissendanner's trial attorneys' actions were unreasonable without any proof from Gissendanner concerning his trial counsel's conversations with Gissendanner. Indeed, the only evidence as to what Gissendanner told his attorneys is Gissendanner's sworn trial testimony. The testimony that Gissendanner alleges counsel should have presented was

testimony that conflicted with Gissendanner's trial testimony. We decline to find counsel ineffective in such a situation. Indeed, to hold otherwise would be to disregard Strickland's mandate that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions" and to conclude that counsel was ineffective for not disbelieving his client. Strickland, 466 U.S. at 691. This is not a case involving deference to a trial court's findings of fact -- this is a case involving Gissendanner's failure to meet his burden of proof.

Based on well established caselaw we hold that counsel were not ineffective in failing to present Anton's testimony because that testimony conflicted with Gissendanner's sworn trial testimony. The circuit court abused its discretion in granting relief on this claim.

2.

The State next argues that the circuit court erred in finding that Gissendanner was denied the effective assistance of counsel because his attorneys failed to present the testimony of Rebecca Gissendanner -- Gissendanner's mother.

At the postconviction evidentiary hearing Rebecca testified that she found a pile of Gissendanner's clothes in the bathroom of her house on the day that the State alleges Snellgrove was murdered and that she put those clothes in a basket on her front porch. The clothes, she said, disappeared when Gissendanner was in Montgomery; thus, she surmised, Gissendanner could not have put the clothes in the abandoned trailer.

First, neither of Gissendanner's attorneys was asked any questions concerning Rebecca's testimony or why her testimony was not presented at Gissendanner's trial. "'If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.'" Dunaway v. State, [Ms. CR-06-0996, December 18, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009), quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007).

Moreover, Rebecca's testimony was inconsistent with Gissendanner's trial testimony. Gissendanner testified under oath that he left the clothes in a basket on his parents' front porch. Furthermore, Gissendanner's trial counsel

presented the testimony of Officer Butch Jones, who testified that he found a pile of clothes in the abandoned trailer after police had searched the trailer. Gissendanner identified those clothes as his, and numerous State witnesses testified concerning what Gissendanner was wearing on the day the State alleges Snellgrove was murdered. Counsel did present testimony that Gissendanner's clothes were not found in the trailer when it was originally searched but were found sometime later.

For the reasons stated above, we hold that the circuit court erred in finding counsel ineffective for failing to present the testimony of Gissendanner's mother.

3.

The State next argues that the circuit court erred in finding that Gissendanner was denied the effective assistance of counsel because counsel failed to interview and present testimony from Emanuel Gissendanner, Sr. -- Gissendanner's father.

At the postconviction evidentiary hearing, Gissendanner's father testified that on the morning that the State alleges that Snellgrove was murdered he got up about 7:00 a.m. and

went to check on his handicapped brother, who lived with his family. When he went through the kitchen, he said, he saw Gissendanner getting a glass of water. His other son, Joshua, was sitting in his car and smoking a cigarette. He further testified that he saw a white Oldsmobile automobile stopped at a stop sign by his house, and Buster Carr was hanging out of the window of that car.

First, trial counsel was never asked why they did not present the testimony of Gissendanner's father at the guilt phase. Gissendanner, Sr., did testify at the penalty phase of Gissendanner's trial. It is clear from the record that counsel frequently spoke to Gissendanner's father. Kominos also testified that he spoke with Buster Carr and that Carr disagreed with the facts Gissendanner set out during his trial testimony. That is why, counsel said, he did not call Carr to testify. As previously stated, Gissedanner did not testify that he saw or spoke with his father at his parent's house that morning.

However, even if defense counsel was aware that Gissendanner's father saw him on the morning of June 22, 2001, counsel could have made a strategic decision to not present

the father's testimony at Gissendanner's trial. "As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias." Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995). See also People v. Dean, 226 Ill.App. 3d 465, 468, 589 N.E.2d 888, 890 (1992) ("All three of the potential alibi witnesses may have been related to codefendant Charles Ferrell, and thus their credibility may have carried little weight. Defense counsel's decision to not offer them as witnesses amounts to trial strategy."); Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir. 1995) ("[A]libi testimony by a defendant's family members if of significantly less exculpatory value than the testimony of an objective witness."); Ball v. United Staets, 271 Fed. Appx. 880, 884 (11th Cir. 2008) ("[The defendant's] alibi witnesses were all close family members with a strong motive to fabricate an alibi defense for him. As such, their testimony would not have been particularly compelling and would have been subjected to vigorous impeachment. If trial counsel had call these alibi witnesses and the jury had disbelieved them, the

jury also could have inferred that [the defendant] was in fact [guilty].").

Because trial counsel was not asked about Gissendanner's father's testimony we cannot base a claim of ineffective assistance of counsel on a silent record -- we must assume that counsel's actions were reasonable. The circuit court erred in granting relief on this claim.

4.

The State next argues that the circuit court erred in finding Gissendanner's attorneys ineffective for failing to interview and present the testimony of Charles Brooks. The State asserts that this specific claim was not raised in Gissedanner's postconviction petition or his amended petition and, thus, the State argues, it is not properly before this Court.

The record shows that the only claim related to Brooks in Gissendanner's amended postconviction petition was that counsel was ineffective for failing to present Brooks's testimony in mitigation. At the postconviction proceedings, Brooks was not listed as a witness, and Gissendanner moved to amend his witness list to add Charles Brooks. He asserted

that Brooks was going to testify concerning a statement that Gissendanner made to him about Buster Carr's pawning the white car to him. The State objected and argued that it could not defend against this claim at such a late date. The circuit court overruled the State's objection. Brooks testified at the postconviction hearing that he saw Buster in a white car early on the morning Snellgrove was alleged to have been murdered and later that same day he saw Gissendanner in the same car. Gissendanner told him, he said, that Buster had pawned the car to him. The State objected to Brooks's hearsay statement. The circuit court overruled that objection. (R. 470.)

The circuit court made the following findings on this claim:

> "Defense counsel failed to interview Charles Brooks, a friend of Gissendanner's who was known to have been with Gissendanner later in the afternoon of June 22, 2001. If asked, Mr. Brooks would have told defense counsel that he saw Buster Carr in a white car at a gas station near Johntown around 7:15 a.m. Friday, June 22, 2001. In addition to being an eyewitness to Buster Carr driving a white car that Friday morning, and support for Gissendanner's story that he had been given the car by Buster, Brooks would have made a credible witness. Brooks has no criminal record and is a member of the National Guard. His testimony would have corroborated Gissendanner's story, reinforced [Gissendanner's]

> Sr.'s and Anton's accounts of that Friday morning, and tended to create a reasonable doubt of Gissendanner's guilt.
>
> "....
>
> "Mr. Brooks could have testified that when he saw Gissendanner driving the victim's car later on Friday evening, that Gissendanner told him that Buster Carr had pawned it to him for drugs."

(C.R. 1171.)

At the postconviction evidentiary hearing, Brooks testified that on June 21, 2001, he saw Buster Carr in a white vehicle around 7:15 a.m. and that later that same day he saw Gissendanner in the same car. Gissendanner told him, he said, that Buster had pawned the vehicle to him. (R. 470.)

Neither of Gissendanner's attorneys was asked any questions concerning Charles Brooks: nor did Gissendanner mention Brooks in his trial testimony. The trial record is silent concerning this claim, and nothing suggests that, before trial, counsel were aware of Charles Brooks. "Counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant ... which is not provided to counsel." Commonwealth v. Bond, 572 Pa. 588, 609-10, 819 A.2d 33, 45-46 (2002). Also, "[w]ithout

testimony from trial counsel, we cannot meaningfully address trial counsel's strategic reasons for the actions that [the defendant] alleges constitute ineffective assistance." Crawford v. State, 355 S.W.3d 193, 199 (Tex. Crim. App. 2011).

> "Due to the lack of evidence in the record concerning trial counsel's reasons for not challenging or striking venire members, we are unable to conclude that appellant's trial counsel's performance was deficient. 'Consistently with Strickland, we must presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that he "made all significant decisions in the exercise of reasonable professional judgment."' Delrio [v. State], 840 S.W.2d [443] at 447 [(Tex. Crim. App. 1992)]. The record in the instant case contains no evidence to rebut that presumption."

Jackson v. State, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

Furthermore, Brooks's testimony concerning what Gissendanner told him about the white car was inadmissible. "'As a general rule, one charged with crime can not make evidence for himself, by proof of his own declarations.'" Williams v. State, 536 So. 2d 169, 170 (Ala. Crim. App. 1988), quoting Stewart v. State, 63 Ala. 199, 200 (1879). Counsel is not ineffective for failing to present inadmissible testimony.

Gissendanner failed to satisfy the Strickland test in regard to this claim. The circuit court erred in granting relief on this claim.

5.

The State next argues that the circuit court erred in finding that Gissendanner's attorneys were ineffective because they failed to interview and present testimony from David Brown.

Concerning this claim, the circuit court stated:

> "The theft of the victim's Oldsmobile was a possible motive for Gissendanner to murder the victim. The fact that the car was stolen was proven without dispute. It was also undisputed that Gissendanner had previously been to the victim's house with Pastor David Brown to perform yard care. However, had defense counsel interviewed Pastor David Brown, they would have been able to undermine this theory through evidence that Gissendanner could not have seen the Oldsmobile at the house, as it was always locked in the garage underneath the home in the garage basement.
>
> "....
>
> "Pastor Brown was available to speak with defense counsel, and had in fact attempted several times to speak with Kominos, but trial counsel failed to ask him about his factual knowledge of the events even though he was on the list to be a State witness. Had they spoken with Pastor Brown, defense counsel could have discredited the State's theory that Gissendanner had seen the victim's car while

> working at her house and returned to steal the car. This evidence would have tended to create reasonable doubt in the State's theory of a motive to commit the murder."

(C.R. 1130-31.)

Brown testified at the postconviction hearing that he was a pastor and a yardman, that Gissendanner's family attended his church, and that he worked on Snellgrove's yard before her death. He testified that Gissendanner went with him to do work at Snellgrove's on one or two occasions. Over objection, Brown also testified that he overheard Buster Carr say that Buster had done tree work for Snellgrove. Brown further testified that there was another car in the neighborhood like Snellgrove's car.

Counsel was asked no questions at the postconviction evidentiary hearing concerning Brown. Also, the record of Gissendanner's trial shows that Brown testified for the State at the guilt phase. Brown testified that he worked on Snellgrove's yard and that Gissendanner helped him with the yard work on one or two occasions. During cross-examination the following occurred:

"[Gallo]: Brother Brown, wait just a minute.

"[Brown]: Okay.

"[Gallo]: I'm Joe Gallo. I believe we've talked before."

(Trial R. 1052-53.) The record clearly shows that Gallo, one of Gissendanner's attorneys, did speak with Brown.

Also, "'[c]ounsel will not be deemed ineffective for failing to present inadmissible evidence.'" Kuehne v. State, 107 S.W.3d 285, 294 (Mo. Ct. App. 2003), quoting Barnum v. State, 52 S.W.3d 604, 608 (Mo. Ct. App. 2001). Brown's testimony about what he overheard Buster Carr say was inadmissible hearsay. Hearsay is defined by Rule 801(c), Ala. R. Evid. as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Moreover, Shirley Hyatt testified at Gissendanner's trial that she saw a black man driving a white car on the morning of June 22, that her sister-in-law had an automobile that was very similar to that automobile, and that she had seen a couple of cars around the area that were similar to the victim's car. (Trial R. 893-96.) Thus, Brown's testimony that there were other cars in the community that were similar

to Snellgrove's car was testimony that was cumulative of Hyatt's trial testimony. "This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel." United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005). See Daniel v. State, 86 So. 3d 405, 430 (Ala. Crim. App. 2011).

Gissendanner failed to establish any prejudice. The circuit court erred in concluding that Gissendanner's attorneys were ineffective for failing to interview and to present Brown's testimony.

6.

The State further argues that the circuit court erred in concluding that Gissendanner's attorneys were ineffective for failing to present the testimony of Kim Gissendanner -- Gissendanner's ex-wife. Specifically, the circuit court found that counsel were ineffective for failing to question Kim Gissendanner about whether the writing on the check matched Gissedanner's handwriting because she was familiar with his handwriting.

The circuit court stated the following concerning this claim: "[D]efense counsel failed to interview a readily

available witness, Gissendanner's ex-wife, Kim Gissendanner, who was familiar with her husband's handwriting and would have testified that the writing on the check did not resemble Gissendanner's." (C.R. 1147.)

Gissendanner's trial attorneys were not asked any questions concerning why they did not present Kim Gissendanner's testimony regarding Gissendanner's handwriting.

> "[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court 'commonly will assume a strategic motivation if any can possibly be imagined,' 3 W. LaFave, et al., Criminal Procedure § 11.10(c) (2d ed. 1999), and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it."

Garcia v. State, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). "[T]he failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." State v. Nicholas, 66 Ohio St. 3d 431, 436, 613 N.E.2d 225, 230 (1993).

Moreover, Gissendanner was charged with violating § 13-9-6, Ala. Code 1975, which provides, in part: "A person commits the crime of possession of a forged instrument in the second degree if he possesses or utters any forged instrument ...."

The State did not have to prove that Gissendanner forged the instrument he possessed. At trial, Gissendanner testified that Buster Carr wrote the check on Snellgrove's account. Thus, counsel's failure to prove that Gissendanner actually forged the check did not result in any prejudice to Gissendanner.

Furthermore, Kominos testified that it was a strategic decision to not retain a handwriting expert and that a visual review of the check showed that it did not match Gissedanner's handwriting.[6]

7.

The State next argues that the circuit court erred in finding that Gissendanner's attorneys were ineffective for failing to interview the bank teller who cashed the check for Gissendanner on the day after the State alleges Snellgrove was murdered.

The circuit court made the following findings concerning this claim:

[6]This issue is discussed, in depth, infra, in Part II D. 4. of this opinion.

> "A bank teller who was a State's witness testified that Gissendanner had been to the bank previously to cash checks from the victim. Defense counsel failed to interview the bank teller. Had defense counsel interviewed the bank teller and done a basic investigation into the victim's checking account they would have found proof that, in fact, no other checks had ever been made out from the victim to Gissendanner. The bank teller's testimony, which was left uncontradicted and was clearly erroneous, tended to create a fictitious prior relationship between Gissendanner and the victim, tending to eliminate reasonable doubt of Gissendanner's guilt. Had defense counsel interviewed the bank teller and subpoenaed the bank records to challenge the State's evidence it would clearly have diminished its credibility and impact and would have tended to create reasonable doubt of Gissendanner's guilt."

(R. 1146.)

At the postconviction evidentiary hearing, counsel were asked no questions about whether they did, in fact, talk to Eva Syples, the bank teller at SouthTrust Bank who cashed the check for Gissendanner on June 23, 2001. Kominos was asked only if he had subpoenaed Snellgrove's bank records and he said he was more interested in her check register and the register indicated that no checks had not been written to Gissendanner. Gissendanner also testified that Snellgrove had not written other checks to him. Brown testified that Snellgrove did not pay Gissendanner directly. Gissendanner

presented no evidence at the postconviction hearing indicating that counsel failed to talk with Syples. Gissendanner failed to rebut the presumption that counsel's actions were reasonable and effective. The circuit court erred in granting relief on this claim.

D.

The State next argues that the circuit court erred in finding that Gissendanner's attorneys were ineffective for failing to hire expert witnesses. Specifically, the circuit court found that counsel were ineffective for failing to secure the services of an independent pathologist and a forensic expert.

Recently, the United States Supreme Court reversed a lower court's holding that counsel was ineffective for failing to secure the services of an expert. The United States Supreme Court, in holding that counsel's actions were reasonable, stated:

> "Strickland [v. Washington, 466 U.S. 668 (1984)] does not enact Newton's third law[7] for the

[7]In 1687, Isaac Newton compiled three laws of motion. The third law states that for every action, there is an equal and opposite reaction.

> presentation of evidence requiring for every prosecution expert an equal and opposite expert from the defense.
>
> "In many instances, cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. And while in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' Murray v. Carrier, 477 U.S. 478, 496 (1980), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy. Here [the defendant's] attorney represented him with vigor and conducted a skillful cross-examination."

Harrington v. Richter, ___ U.S. ___, ___, 131 S.Ct. 770, 791 (2011). "'Counsels' failure to call an expert witness is not per se ineffective....'" Marshall v. State, 20 So. 3d 830, 841 (Ala. Crim. App. 2008), quoting People v. Hamilton, 361 Ill. App. 3d 836, 847, 838 N.E.2d 160, 170, 297 Ill. Dec. 673, 683 (2005). "There is no per se rule that requires trial attorneys to seek out an expert." Gersten v. Senkowski, 299 F. Supp. 2d 84 (E.D.N.Y. 2004).

Moreover, "[a]n attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." People v. Payne, 285 Mich. App. 181, 190, 774

N.W.2d 714, 722 (2009). "Calling an expert witness is a matter of trial strategy, State v. Rodriquez, 126 Ariz. 28, 33, 612 P.2d 484, 489 (1980), and unless counsel's decision has no 'reasonable basis,' a reviewing court will not find ineffectiveness." State v. Sammons, 156 Ariz. 51, 56, 749 P.2d 1372, 1377 (1988). "[T]he failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." State v. Nicholas, 66 Ohio St. 3d 431, 436 (1993).

With these principles in mind we review the State's issues.

1.

First, the State argues that the circuit court erred in finding that Gissendanner's attorneys were ineffective for failing to secure the services of a pathologist. Gissendanner argued in his petition that there was no evidence as to the cause of Snellgrove's death.

The circuit court stated the following when addressing this claim:

> "Had defense counsel investigated the autopsy report and consulted with a pathologist, they could

> have offered evidence that there was no discernable cause of death. ...
>
> "The expert pathologist at the evidentiary hearing explained that while decomposition does occur first in the area of the body where there is an opening, and thus maggot infestation around the head and neck could reflect a laceration in the skin at some point, this was a body that had undergone serious postmortem injuries, including a broken neck and broken ribs. There was simply no evidence during the autopsy of any ante mortem lacerations or other trauma. The expert pathologist explained that the autopsy did not uncover blood in the brain, abrasions or fractures on the skull, bruising or bleeding in the skin around the neck, a broken hyoid bone, or any indicators of blows to the had or neck sufficient to cause death. Defense counsel could have used such testimony in an attempt to prove that there was no evidence of how the victim came to die."

(C.R. 1137-38.)

At Gissendanner's trial Dr. Emily Ward, a forensic pathologist, testified that on June 27, 2001, she was called to an isolated area after a body had been discovered in a ditch. She testified that the body was that of an older woman who had been dead for awhile, that she used dental records to identify the body as Snellgrove, and that the body was in an advanced state of decomposition. Dr. Ward testified that she had performed approximately 4,000 autopsies in her career, and, because of the greater decomposition around the back of

the scalp and the right side of the neck, it was her opinion that Snellgrove died of injuries to her head and neck. During cross-examination Dr. Ward said that she could not determine if the trauma to the neck area was the result of blunt-force trauma. When defense counsel asked Dr. Ward if the trauma could have been caused by a fall, she testified that in her opinion Snellgrove's injuries were not caused by a fall:

> "I think it was more than one injury to the head. The scalp on the back part of the skull, and the whole back of the scalp was not recognizable. But I don't think it was a single blow, although it might have been. If it were, it certainly would have been a heavy blow."

(Trial R. 1141.)

At the postconviction evidentiary hearing Gissendanner presented the testimony of Dr. Marvin Pietruszka, a criminal pathologist. The State objected and cited Horsley v. Alabama, 45 F.3d 1486 (11th Cir. 1995), and Davis v. Singletary, 119 F.3d 1471 (11th Cir. 1997). It argued that Gissendanner failed to show that an expert would have been available at the time of the trial in 2003 to testify to the substance of Dr. Pietruszka's postconviction testimony. Dr. Peitruszka, who had performed approximately 400 autopsies, testified that it

was his opinion that there was no evidence of trauma to the head or neck area and that Snellgrove could have suffered a cardiac episode and collapsed and fallen. The conclusion that Snellgrove may have fallen was based, he said, on the spot of blood that had been found in the carport, the fact that Snellgrove was on medication for high blood pressure, and the fact that Snellgrove's glasses had been broken.

At the postconviction evidentiary hearing, Kominos testified that he had no reason to question the cause of Snellgrove's death because, he said:

> "[Kominos]: I went up there to her house. You see, at that time they didn't know where she was. She was missing. And I went over there and looked at the carport, the wooden bench that had been knocked over, the cat bowl, the blood. Oh, yeah, there was no doubt from viewing what I viewed, the physical evidence, that she was, she was assaulted.
>
> "[Postconviction counsel]: Yes, sir.
>
> "[Kominos]: And bludgeoned."

(R. 74-75.)

Also the transcript of Gissendanner's trial shows that Dan Prestwood, a former officer with the Ozark Police Department, testified that he was dispatched to Snellgrove's house when she was reported missing and that when he first

examined her carport there was a lot of blood but there had been a heavy rain before the photographs of the scene had been taken and a lot of that blood had been washed away. (Trial R. 1166.) He further testified that when he arrived on the scene there was a lot of blood and hair in the carport, that he found a pair of broken glasses that had a lens knocked out and damage to the frame, that a two-person rocker had been turned over, that he found an earring in the area, and that there was blood splatter on the back wall of the carport and on a bench.

Based on Kominos's personal observations of the crime scene and Prestwood's testimony, counsel had no reason to doubt the State's expert cause of death. "A postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial." State v. Combs, 100 Ohio App. 3d 90, 103, 652 N.E.2d 205, 213 (1994).

The circuit court erred in finding that Gissendanner's attorneys were ineffective for failing to secure the services of a pathologist.

2.

The State next argues that the circuit court erred in concluding that Gissendanner's attorneys were ineffective for failing to secure the services of a forensic expert. The State argues that the circuit court erred in concluding that counsel was ineffective for failing to hire a forensic expert to conduct tests on the following items: (1) a sheet, shirt, and pair of pants found in the abandoned trailer; (2) a white bucket containing papers belonging to Snellgrove that was found in the abandoned trailer; (3) fingerprint analysis on the contents of the abandoned trailer; (4) fingerprint analysis on the items in Snellgrove's carport; (5) analysis of trace evidence found in the carport; (6) analysis of trace evidence found in the trunk of Snellgrove's car; (7) forensic tests on the knife found in Snellgrove's car; (8) analysis of trace evidence found at the pond where the body was discovered; (9) fingerprint analysis of the wallet found near Snellgrove's body; (10) forensic analysis of the tire tracks near the pond; (11) soil samples for comparison with the soil in Snellgrove's automobile tires; (12) forensic tests of Gissendanner's sock; (13) forensic tests on Gissendanner's

clothes and shoes; and (14) and DNA tests on the sock to test for Gissendanner's DNA.

The circuit court stated the following concerning this claim:

> "[N]one of the trace evidence collected at the carport scene was ever tied to Gissendanner, even though many types of evidence were collected. Indeed, no trace evidence in this capital murder case was tested by the state to show a link to Gissendanner. ... Had these facts proving that none of the evidence collected at the carport was linked to Gissendanner been presented to the jury, it would have tended to create a reasonable doubt as to his presence there at the time the crime was committed and as to his guilt of the offense."

(C.R. 1135-36; citations to the record omitted.) The circuit court further stated:

> "Defense counsel failed to investigate the documents provided to them and to consult with a forensic expert to find that the physical evidence did not support the State's theory that a fatally injured person with head and neck wounds had been transported in the trunk of the Oldsmobile. ...
>
> "....
>
> "The trace evidence collected from the pond area was never connected to Gissendanner. The wallet that was found along that same path to the ravine was tested for fingerprints, and the identifiable prints found on that wallet did not link to Gissendanner. Moreover, tire tracks visible at the pond scene were never tested against the tires of the Oldsmobile, and no soil sample comparisons were

> run. Had defense counsel investigated the facts behind the State's theory, they could have pointed out to the jury that none of the pond scene evidence implicated Gissendanner. This would have tended to create a reasonable doubt of Gissedanner's guilt.
>
> "At trial, the State alleged that Gissendanner had used the knife found in the Oldsmobile to cut all the branches covering the victim's body at the pond. The non-forensics-expert police officer on the stand told the jury that he could identify 'fresh scrapes' and sap on the blade that would have come from cutting at the branches. The State then offered one small branch into evidence that had originated from a tree at the ravine, and the police officer told the jury that it was apparent where the knife had hacked the branch before it was broken into two pieces. Had trial counsel consulted with a forensic expert, they could have discredited this evidence about the knife being the instrument which cut any of the branches. A forensics expert or another with expertise in metals could have presented evidence that wood cannot make cuts into a metal knife blade."

(C.R. 1140-43.)(Citations to the record omitted.)

First, Gissendanner did not ask counsel any questions about why counsel failed to hire an expert to conduct the above-listed tests and examinations. The record is silent concerning this claim.

Moreover, the record of Gissendanner's trial shows that counsel vigorously cross-examined the State's witnesses about

the lack of forensic evidence connecting Gissendanner to the murder. The State's fingerprint expert, Gloria Walters, was thoroughly cross-examined about the quantity of evidence she had been given to test and that out of all that evidence she found only two of Gissendanner's fingerprints. Counsel also thoroughly questioned Dan Presswood about the knife that had been found in Snellgrove's car. During Presswood's testimony the State moved to admit tree limbs located near where Snellgrove's body was found and the knife and defense counsel moved that he be allowed to voir dire Presswood. Counsel questioned Presswood about the fact that a lot of the branches covering Snellgrove's body were large limbs that could not have been cut with a knife, that the limbs that were in the photographs of the location where they found Snellgrove's body did not have linear cuts on them that matched cuttings made from a knife. Walters testified that no identifiable prints were found on Snellgrove's wallet. Gissendanner also testified that the sock that had blood on it belonged to him; therefore, there would have been no need to have DNA testing done on the sock to see if it contained Gissendanner's DNA. Gissendanner also testified at trial that he had driven

Snellgrove's car to the pond to go fishing; consequently, trace test comparisons of the soil in the tire tread and the soil around the pond were not necessary. Gissendanner failed to establish any prejudice; thus, he was due no relief on this claim.

Furthermore, the circuit court found counsel ineffective for failing to retain a forensic expert to conduct numerous tests; however, no evidence was presented at the postconviction hearing that any of the identified tests had been conducted by the postconviction expert; i.e., that any evidence derived from those tests was, in fact, favorable to Gissendanner. There was no direct evidence to support this claim, merely speculation. At the postconviction evidentiary hearing Gissendanner presented the testimony of Larry Steward, a forensic science expert. Steward testified on cross-examination that he had conducted no tests on any of the evidence that had been collected on the case.

> "[D]efendant has merely speculated that an independent expert could have provided favorable testimony. In other words, defendant has failed to show that the retention of an independent expert would have altered the outcome of the lower court proceedings."

People v. Payne, 285 Mich. App. 181, 190, 774 N.W.2d 714, 722 (2009). "A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." United States v. Ashimi, 932 F.2d 643, 650 (7th Cir. 1991). "We will not find ineffective assistance of counsel where claims are based on nothing more than speculation or conjecture." Thomas v. State, 306 Ga. App. 279, 282, 701 S.E.2d 895, 897 (2010). "Speculation about what an expert could have said is not enough to establish prejudice." Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997). The circuit court erred in granting relief on this claim.

3.

The State further argues that the circuit court erred in finding that Gissendanner's attorneys were ineffective for failing to hire a fingerprint expert to challenge the corrected fingerprint report. The record shows that an initial fingerprint report was submitted by Walters, the State's fingerprint expert. This report concluded that no identifiable fingerprints were recovered from the rearview mirror of the car, which was submitted for testing. A second

fingerprint report was submitted. In this report, Wallace concluded that a fingerprint lifted from the rearview mirror had been identified as Gissendanner's.

The circuit court made the following findings concerning this claim:

> "Crime scene forensics expert Larry Stewart, long time head of the U.S. Secret Service Forensics Laboratory, testified that the inexplicably altered fingerprint report was very troubling, as such an unexplained alteration reflects a deviation from standard procedures. Moreover, the item from the car on which an altered fingerprint finding was made was one from which no chain of custody existed. Defense counsel could have used this testimony in a motion to exclude the 'corrected' report. Had the defense investigated the case through review of documents and/or retention of a forensics expert, they could have educated the jury about the lack of any fingerprints from the scene tying to Gissendanner, and this would have tended to create a reasonable doubt that Gissendanner was at the victim's home that Friday morning and took the Oldsmobile from her garage."

(C.R. 1135; citations to the record omitted.)

At the postconviction evidentiary hearing, counsel was asked no questions concerning why they failed to retain a fingerprint expert. No evidence was presented at the postconviction evidentiary hearing as to why counsel acted as they did. Thus, we must presume that counsel's actions were reasonable. "Under our system of justice, the criminal

defendant is entitled to an opportunity to explain himself and present evidence on his behalf. His counsel should ordinarily be accorded an opportunity to explain her actions before being condemned as unprofessional and incompetent." Bone v. State, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). "A record, '... silent as to why appellant's trial counsel took or failed to take ...' certain actions is not adequate to establish ineffective assistance of counsel." Hervey v. State, 131 S.W.3d 561, 564 (Tex. App. 2004).

Moreover, the record of Gissendanner's trial shows that the State presented the testimony of Gloria Walters, a latent fingerprint examiner with the Alabama Bureau of Investigation. Walters testified that she identified Gissendanner's fingerprint on a check and on the rearview mirror of a car that had been submitted to her. On cross-examination, counsel questioned Walters about the number of fingerprints she had been given to identify. The following occurred:

> "[Kominos]: You received a rearview mirror that appeared to come from an automobile. And what other items did you receive?
>
> "[Walters]: I received a lady's wallet.
>
> "[Kominos]: Okay.

"[Walters]: A cell phone --

"[Kominos]: A cell phone?

"[Walters]: -- in a leather case. A lady's purse containing assorted makeup items.

"[Kominos]: Okay.

"[Walters]: A SouthTrust Bank check --

"[Kominos]: Okay.

"[Walters]: -- believed to be this one.

"[Kominos]: Okay.

"[Walters]: An ashtray.

"[Kominos]: Okay.

"[Walters]: Inside rearview mirror.

"[Kominos]: All right.

"[Walters]: An original [Bowie] knife.

"[Kominos]: Okay.

"[Walters]: Three latent lifts in one envelope, and then 32 latent lifts in another envelope.

"....

"[Kominos]: Did you receive a white plastic bucket?

"[Walters]: No.

"[Kominos]: Did you receive a cigarette pack, a Newport cigarette pack?

"[Walters]: No.

> "....
>
> "[Kominos]: Okay. All the items that you received, though: the check, the mirror -- and what else is it that we're -- testified -- the check and the mirror and what else?
>
> "[Walters]: Those are --
>
> "[Kominos]: Is that all?
>
> "[Walters]: Those are the only two items that contained identified prints."

(Trial R. 1300-03.) Counsel thoroughly cross-examined Walters about her training, experience, and the controls used to verify her conclusions. Counsel conducted a vigorous cross-examination of the State's fingerprint expert.

> "[T]he decision to question the fingerprint expert about the reliability of fingerprints or to acquire a defense fingerprint expert falls within trial strategy. When questioning the fingerprint expert about the reliability of fingerprint analysis, even if negative aspects regarding the science were introduced, the reliability of fingerprint analysis would almost certainly have been noted as well. Furthermore, if trial counsel had called a defense expert, that expert may have agreed with the State's fingerprint expert's findings, thus strengthening the State's case."

Taylor v. State, 109 So. 3d 589, 598 (Miss. Ct. App. 2013).

Furthermore, Gissendanner admitted at trial that he was in Snellgrove's car and that he took one of Snellgrove's checks to a SouthTrust Bank to be cashed. Overwhelming

evidence was presented by the State that Gissendanner was in Snellgrove's car and that he cashed one of her checks. Thus, Gissendanner failed to establish any prejudice from counsel's failure to retain a fingerprint expert, and the circuit court erred in granting relief on this claim.

4.

The State argues that the circuit court erred in concluding that counsel was ineffective for failing to secure the services of a handwriting expert to counter the State's handwriting expert concerning the author of Snellgrove's check.

The circuit court made the following findings on this claim:

> "Knowing that the State would put a handwriting expert on the stand, defense counsel failed to interview the expert and did not retain its own handwriting expert to rebut the State's allegations that Gissendanner altered the entries on the front of the check. Knowing that the State would put an expert before the jury to say that Gissendanner forged the front entries on the check, in a case in which the sole evidence of the forgery counts was the check itself, defense counsel failed to consult with or retain anyone who could refute the State expert's arguments.
>
> "At the Rule 32 hearing, defense counsel attempted to explain away the failure to consult a handwriting expert by admitting that he believed

> handwriting analysis to be a 'sham.' Defense counsel felt the jury 'should make a determination as to whether the handwriting was Gissendanner's and not listen to what some so-called expert regarding handwriting has to say.' Furthermore, defense counsel failed to interview a readily available witness, Gissendanner's ex-wife, Kim Gissendanner, who was familiar with her ex-husband's handwriting and would have testified that the writing on the check did not resemble Gissendanner's.
>
> "Had defense counsel retained a handwriting expert, they could have presented the jury with evidence tending to create a reasonable doubt that Gissendanner was the person who forged the check. At trial, the State's expert testified that it was 70-75% likely and 90% likely that Gissendanner wrote sections of the check in question. However, the document analysis expert at the habeas hearing explained that the State's expert was wrong to make such findings based on the limited handwriting on the check. In fact, the Rule 32 handwriting expert opined that the handwriting on the front of the check was probably not Gissendanner's and that there simply was not enough evidence to make it likely that Gissendanner had forged the front of the check that he endorsed and cashed.
>
> "From the testimony of the handwriting expert at the Rule 32 evidentiary hearing, the court finds that a defense handwriting expert at trial would have been able to offer testimony tending to discredit the testimony of the State's expert."

(C.R. 1146-48; citations to the record omitted.)

At the postconviction evidentiary hearing Kominos explained on cross-examination why he did not retain a handwriting expert:

> "I believe that had we gotten a handwriting expert and I put him on the stand, that would prohibit me from saying that there is no such thing as handwriting experts. Handwriting experts are -- it's a sham, and that was my position; that this man knows no more than a layman. They make their determination by the loops and the swirls. And so I felt that I had a better position to convince the jury that they should make a determination and not listen to what some so-called expert regarding handwriting has to say."

(R. 69.) Counsel further testified that if they had retained a handwriting expert it would have been one expert argument another expert. (R. 69.)

Moreover, counsel vigorously cross-examined the State's handwriting expert. On cross-examination, the State's handwriting expert, Steve Drexler, said that he could not conclusively say that Snellgrove's name on the front of the check was written by Gissendanner. The following then occurred:

> "[Defense counsel]: It is merely inconclusive? Sir, I show you that. He can't even spell Margaret. He misspelled Margaret. Now, how can that be inconclusive? He misspelled it. Look at the letters. I mean, I'm no [handwriting] expert but it appears to me that [it] is completely two different people."

(Trial R. 1332.)

The decision whether to hire a handwriting expert is a strategic one.

> "[The petitioner] also asserts that her counsel was ineffective for failing to obtain an expert witness or a handwriting expert to testify on her behalf. Declining to call or investigate an expert can be a strategic decision that falls well within the range of reasonable professional assistance. See, e.g., United States v. Valencia-Rios, 639 F. Supp. 2d 98, 106-07 (D.D.C. 2009) (finding that counsel's decision whether to call or investigate certain lay and expert witnesses stemmed from a strategic decision that was within the range of competent professional assistance)."

Hoover-Hankerson v. United States, 792 F. Supp. 2d 76, 84 (D.D.C. 2011). See also Dulvio v. State, 292 Ga. 645, 740 S.E.2d 574, 581 (2013) ("[U]nder the circumstances of this case, it cannot be said that the decision to forego securing a handwriting expert to examine the letters was unreasonable."); Smith v. West, 640 F. Supp. 2d 222 (W.D.N.Y. 2009) (holding that decision not to call handwriting expert was not ineffective assistance); State v. Addison, 8 So. 3d 707 (La. App. 2009) (refusing to second-guess counsel's decision not to hire a handwriting expert); Noorlun v. State, 736 N.W.2d 477 (N.D. 2007) (holding that failure to call handwriting expert was trial strategy and did not amount to ineffectiveness); Williams v. State, 226 S.W.3d 871, 874 (Mo.

App. 2007) ("[Counsel's] decision not to consult a handwriting expert ... was clearly based on trial strategy."); Tisius v. State, 183 S.W.3d 207 (Mo. 2006); Garrett v. State, 328 Mont. 165, 119 P. 3d 55 (2005) (holding that no prejudice was shown by counsel's failure to retain a handwriting expert in a forgery case); United States v. Tarricone, 21 F.3d 474 (2d Cir. 1993) (holding that counsel's decision not to secure the services of a handwriting expert was a strategic decision that was not unreasonable); Lovett v. State, 627 F.2d 706, 709 (5th Cir. 1980) ("[Counsel's] failure to have the [handwriting] analysis done has not been shown to be the kind of ineffective assistance that requires reversal.")

> "The Second Circuit has stated that 'in case after case,' it has 'declined to deem counsel ineffective notwithstanding a course of action (or inaction) that seems risky, unorthodox or downright ill-advised.' Loliscio v. Goord, 263 F.3d 178, 195 (2d Cir. 2001) (citing Tippins v. Walker, 77 F.3d 682, 687 (2d Cir. 1996) (citing United States v. Tarricone, 21 F.3d 474, 476 (2d Cir. 1993) (decision to forgo testimony of handwriting expert); United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987) (decision to forgo opening statement), cert. denied, 484 U.S. 957, 108 S.Ct. 355, 98 L.Ed.2d 380 (1987); Cuevas v. Henderson, 801 F.2d 586, 590 (2d Cir. 1986) (questioning by defense counsel 'opened the door' to damaging evidence), cert. denied, 480 U.S. 908, 107 S.Ct. 1354, 94 L.Ed.2d 524 (1987))). To find that defense counsel's chosen strategy was such a professionally deficient judgment as to deny

> petitioner of the right to counsel would require this Court to engage in the kind of second-guessing expressly prohibited by the Supreme Court and Second Circuit."

Gibbs v. Donnelly, 673 F. Supp. 2d 121, 139 (W.D.N.Y. 2009).

> "A trial strategy decision may only serve as a basis for ineffective counsel if the decision is unreasonable. Zink [v. State], 278 S.W.3d [170] at 176 [(Mo. 2009)]. The choice of one reasonable trial strategy over another is not ineffective assistance. Id. '[S]trategic choices made after a thorough investigation of the law and the facts relevant to plausible opinions are virtually unchallengeable[.]' Anderson [v. State], 196 S.W.3d [28] at 33 [(Mo. 2006)] (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052)."

McLaughlin v. State, 378 S.W.3d 328, 337 (Mo. 2012). "[T]rial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance." State v. Sallie, 81 Ohio St. 3d 673, 675, 693 N.E.2d 267, 269 (1998). "[W]e will not typically disturb the strategic or tactical decisions of trial counsel." State v. Beecroft, 813 N.W.2d 814, 845 (Minn. 2012). "[A] tactical decision will not form the basis for an ineffective assistance of counsel claim unless it was 'so patently unreasonable that no competent attorney would have chosen it.'" Brown v. State, 288 Ga. 902, 909, 708 S.E.2d 294, 301 (2011).

> "The decision of how to deal with the presentation of an expert witness by the opposing side, including whether to present counter expert testimony, to rely upon cross-examination, to forego cross-examination and/or to forego development of certain expert opinion, is a matter of trial strategy which, if reasonable, cannot be the basis for a successful ineffective assistance of counsel claim."

Thomas v. State, 284 Ga. 647, 650, 670 S.E.2d 421, 425 (2008).

The circuit court erred in finding that counsel was ineffective for failing to secure the services of a handwriting expert. Clearly, counsel made a strategic decision to not retain that expert but to rely instead on cross-examination of the State's expert and the jurors' own review of the documents. Thus, the circuit court erred in granting relief on this claim.

5.

The State further argues that the circuit court erred in concluding that Gissendanner's attorneys were ineffective for failing to retain a chain-of-custody expert to challenge the chain of custody of the State's evidence.

The circuit court stated the following concerning this claim:

> "There were chain of custody problems with some of the State's physical evidence which went undiscovered and unpresented because of counsel's

> failure to investigate. These deficiencies in the State's case would have been discovered through investigation and consultation with a forensic expert. The chain of custody related to the sock had problems which would have tended to create a reasonable doubt as to its reliability .... While clearly the sock was taken from the bag for cuttings and several examinations during its years in the lab, and then somehow made it back to Ozark for trial, no chain of custody exists. A forensics expert could have explained the concerns with such a faulty chain of custody .... Reasonably effective assistance from defense counsel would have included these challenges to the cha[in] of custody issues pertaining to the sock and other evidence through investigation and the use of a forensic expert, all of which would have tended to create a reasonable doubt of Gissendanner's guilt."

(C. 1158-60; citations to the record omitted.)

First, counsel were asked no questions concerning the chain of custody of the State's evidence and why counsel did not hire an expert to challenge the chain of custody for any of the State's evidence. Therefore, in the face of this silent record, we must presume that counsel's actions were reasonable.

Moreover, the circuit court's order fails to consider § 12-21-13, Ala. Code 1975, which provides:

> "Physical evidence connected with or collected in the investigation of a crime shall not be excluded from consideration by a jury or court due to a failure to prove the chain of custody of the evidence. Whenever a witness in a criminal trial

> identifies a physical piece of evidence connected with or collected in the investigation of a crime, the evidence shall be submitted to the jury or court for whatever weight the jury or court may deem proper. The trial court in its charge to the jury shall explain any break in the chain of custody concerning the physical evidence."

As this Court stated in Lee v. State, 748 So. 2d 904 (Ala. Crim. App. 1999):

> "In Land v. State, 678 So. 2d 201 (Ala. Cr. App. 1995), aff'd, 678 So. 2d 224 (Ala. 1996), a case which appears to rely on § 12-21-13, this court ruled that where a witness can specifically identify the evidence, and its condition is not an issue in the case, then the State is not required to establish a complete chain of custody in order for the evidence to be admitted into evidence. We stated: 'The eyeglasses were admissible without establishing a chain of custody because [the testifying officer] was able to specifically identify them, and their condition was not an issue in the case.' Land, 678 So. 2d at 210."

748 So. 2d at 912-13.

Moreover, it appears that the circuit court found counsel ineffective for failing to challenge how the Dale County circuit clerk would ultimately store the evidence after Gissendanner's trial. "Generally, counsel is not ineffective for failing to anticipate arguments or appellate issues that only blossomed after defendant's trial and appeal have concluded." Sherrill v. Hargett, 184 F.3d 1172, 1175 (10th

Cir. 1999). "[C]ounsel's performance must be judged as of the time of counsel's conduct ...." Muniz v. United States, 360 F. Supp. 2d 574, 579 (S.D. N.Y. 2005).

Furthermore, a review of Gissendanner's trial record shows that a chain of custody was established for the State's evidence. Counsel had no reasonable grounds for challenging how that evidence would ultimately be stored by the circuit clerk.

For these reasons, the circuit court erred in granting relief on this claim.

III.

The State last argues that the circuit court erred in finding that counsel's performance at the penalty phase was ineffective for failing to present the testimony of Rebecca Gissendanner, Olympia Gissendanner, and Pastor David Brown.

The circuit court made the following findings concerning this claim:

> "Here, defense counsel failed to investigate and interview family and friends who would have provided important information for the penalty phase. There were family and friends easily discoverable and available who would have been willing to testify favorably for Gissendanner in the penalty phase. Defense counsel did not speak with them, gather information and determine who would provide the best

evidence of Gissendanner's humanity to the jury and the Court. Defense counsel apparently decided with no investigation that Gissendanner's father and ex-wife would provide the best testimony. But had they investigated and interviewed family members and friends to assess who would be the best mitigation witnesses, they would have developed testimony and evidence tending to convince the jury to sentence Gissendanner to life in prison rather than death.

"Rebecca Gissendanner, Gissendanner's mother, was willing to make herself available to speak with her son's lawyers. Had they spoken with her, they would have learned information that could have been used as nonstatutory mitigating circumstances. For example, Rebecca could have humanized her son through information that Gissendanner was loveable, dependable, and close to his children, nieces, and nephews ....

"Rebecca could also have told trial counsel about her son's sacrifice of a future in college football in order to stay home and marry his pregnant girlfriend. She would have let them know about his good and kind heart. And all of this testimony would have come from not just a mother, but a devout church-goer who took her children, including Gissendanner, every week to Wednesday night services, Friday night services, and Sunday morning and evening services. Rebecca would have testified about such information -- which was never put before the jury -- had counsel asked. The testimony of Gissendanner's mother would have tended to convince the jury to recommend life without parole instead of the death penalty.

"Olympia Gissendanner, Gissendanner's sister, was willing to make herself available to speak with her brother's lawyers and testify at his trial. She would have testified that she did not think her brother had the personality or character to have committed the acts of which he was accused.

> Moreover, had counsel spoken with Olympia in 2001, or any time before the 2003 trial, she would have shared with them family photographs with siblings and his mother -- photographic evidence that defense counsel could have put before the jury to further humanize Gissendanner and show his connection with his family.
>
> "Olympia also could have spoken as a loving younger sister who had felt protected by Gissendanner. Moreover, she could have spoken as an aunt who knew that her nieces had a good father in Gissendanner. ....
>
> "Pastor David Brown, the Gissendanner family pastor, also wanted to testify on behalf of Gissendanner, and tried to meet with defense counsel to say he was willing to testify on his behalf. Pastor Brown's testimony would have tended to convince the jury to recommend a sentence of life without parole rather than the death penalty.
>
> "Applying the above cited law to the finding of facts, this court concludes that defense counsel's failure to investigate rendered their assistance in the mitigation phase constitutionally inadequate."

(C.R. 1176-80.)

The circuit court failed to consider what mitigation evidence that counsel did, in fact, present at the penalty phase. "Although Petitioner's claim is that his trial counsel should have done more, we first look at what the lawyer did in fact." Chandler v. United States, 218 F.3d at 1320.

At the penalty phase of Gissendanner's trial, counsel presented seven mitigation witnesses. The witnesses included:

Dr. Kathleen Ann Ronan, a clinical and forensic psychologist; Calvin Parker, assistant principal at the high school Gissendanner attended; James Kiger, Gissendanner's former employer; Lt. Ron Nelson, Assistant Warden at Dale County Correctional Facility; Robert Smith, a pastor at New Covent Church in South Newton; Kim Gissendanner, Gissendanner's ex-wife; and Emanuel Gissendanner Sr., Gissendanner's father.

Dr. Ronan testified that she had evaluated Gissendanner and that she had performed intelligence and personality tests on Gissendanner. Dr. Ronan testified that based on her evaluation and examination of Gissendanner's personal history, it was her opinion that Gissendanner has a learning disorder, that he reads at a fifth-grade level, that he had a long history of substance abuse, that he was mildly depressed, that he had heart problems or enlargement of one of the ventricles of his heart, which caused dizziness and is associated with anxiety, and that he had no history of violent behavior.

Parker testified that he coached Gissendanner in high school while Gissendanner was involved in football and that Gissendanner was dependable, well mannered, was not violent, and was not a discipline problem.

Kiger testified that Gissendanner worked for him at Larry's Bar-B-Que restaurant in 2000 and 2001, that Gissendanner was a good worker, that Gissendanner did not cause any problems, and that he was not scared of Gissendanner.

Lt. Nelson testified that when Gissendanner was incarcerated at Dale County Correctional Facility for two years Gissendanner was never a disciplinary problem and was never aggressive, that when one of the other inmates hit Gissendanner over the head with a broom handle Gissendanner did not fight the other inmate but "calmly grabbed the broom handle," and that Gissendanner had "acclimated himself to jail life." (Trial R. 1617.)

Pastor Smith testified that he conducts a prison ministry at the Dale Correctional Facility and that he met Gissendanner through that ministry. Smith testified that he held weekly sessions in the jail, that Gissendanner attended voluntarily, that Gissendanner was attentive and participated by asking questions, that Gissendanner studied the scriptures and the Bible, and that he baptized Gissendanner while Gissendanner was in jail.

Kim Gissendanner testified that she was married to Gissendanner for about five years, that they have two daughters, that after they divorced Gissendanner maintained frequent contact with his daughters, that his daughters love him, and that his daughters write letters to him in prison. She asked that the jury spare his life.

Emanuel Gissendanner, Sr., testified that he is Gissendanner's father and is the father of six children, that he was a veteran and was injured in the Gulf War, that after leaving the military he worked at Ozark Veterinary Clinic for 30 years, that at one point Gissendanner worked with him at the clinic but had to leave when he got sick, that Gissendanner was offered an athletic scholarship to a college in the Midwest but that he did not take the scholarship because his girlfriend had gotten pregnant and he elected to stay and have a family, that he had no problems with Gissendanner when he was growing up, that Gissendanner was not a violent person, and that Gissendanner was a loving father to his two daughters, and that he was a respectful son. He begged the jury to show mercy and to spare his son's life.

"Appellant cannot establish ineffective assistance on the general claim that additional witnesses should have been called in mitigation." Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990). "Counsel was not 'ineffective for not putting on cumulative evidence' from these other witnesses." Storey v. State, 175 S.W.3d 116, 138 (Mo. 2005).

> "Any testimony the additional witnesses would have provided would have been cumulative to that provided by the witnesses at resentencing. As discussed above, trial counsel are not ineffective for failing to present cumulative evidence. See Marquard v. State, 850 So. 2d 417, 429-30 (Fla. 2002) ('[C]ounsel is not required to present cumulative evidence.'). Moreover, the cumulative mitigation testimony would not have outweighed the State's evidence in aggravation. See, e.g., Bell v. State, 965 So. 2d 48 (Fla. 2007) (finding that the defendant did not demonstrate the prejudice prong because the unpresented penalty phase testimony could not have countered the quantity and quality of the aggravating evidence); see also Gaskin v. State, 737 So. 2d 509, 516 n. 14 (Fla. 1999) ('Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.'). The additional testimony would only have added to the mitigation already found."

Rhodes v. State, 986 So. 2d 501, 512-13 (Fla. 2008).

"[W]hen, as here, counsel has presented a meaningful concept of mitigation, the existence of alternate or

additional mitigation theories does not establish ineffective assistance." State v. Combs, 100 Ohio App. 3d 90, 105, 652 N.E.2d 205, 214 (1994). "Most capital appeals include an allegation that additional witnesses could have been called. However, the standard of review on appeal is deficient performance plus prejudice." Malone v. State, 168 P.3d 185, 234-35 (Okla. Crim. App. 2007).

This Court has thoroughly reviewed Gissendanner's trial proceedings. There is no indication that counsel conducted themselves in any manner but as skilled advocates in the face of compelling evidence of Gissendanner's guilt. Clearly, this is not a case where counsel failed to investigate and was not prepared for trial. Although the record supports the conclusion that counsel investigated, counsel was asked few questions about what investigation they did, in fact, conduct in preparation for Gissendanner's trial. The record shows that Gissendanner's attorneys were thoroughly prepared, that they vigorously cross-examined the State's witnesses and made every effort to attack the State's evidence against Gissendanner, and that they presented a great deal of mitigation evidence in the penalty phase. Nonetheless, the

circuit court erroneously presumed that counsel's actions were ineffective with no evidence to support those conclusions; it failed to consider what evidence counsel did, in fact, present; and it found that Gissendanner's attorneys were ineffective based on a silent record. "On such a silent record, this court can find ineffective assistance of counsel only if the challenged conduct ... was 'so outrageous that no competent attorney would have engaged in it.'" Nadal v. State, 348 S.W.3d 304, 322 (Tex. App. 2011). That standard was not satisfied in this case. The conclusion we reach today is consistent with this Court's holdings in Stallworth v. State, [Ms. CR-09-1433, May 2, 2014] ___ So. 3d ___ (Ala. Crim. App. 2013) (opinion on return to remand); Broadnax v. State, 130 So. 3d 1232 (Ala. Crim. App. 2013); and Bryant v. State, [Ms. CR-08-0405, September 5, 2014] ___ So. 3d ___ (Ala. Crim. App. 2011) (opinion on return to second remand).

For the foregoing reasons, we hold that the circuit court erred in granting Gissendanner's petition for postconviction relief. Accordingly, we reverse the circuit court's ruling and direct that court to reinstate Gissendanner's capital-murder conviction and sentence of death.

REVERSED AND REMANDED.

Kellum, J., concurs; Lyons, Special Judge, concurs specially; Burke, J., dissents, with opinion; Joiner, J., dissents, with opinion, which Burke, J., joins; Windom, P.J., recuses herself.[8]

LYONS, Retired Associate Justice, concurring specially.

I concur fully in the main opinion.

I write specially as to the claim of ineffective assistance of counsel based on counsel's alleged failure to call certain fact witnesses during the trial in which Emanuel Aaron Gissendanner, Jr., was convicted of capital murder of a woman at whose house he had once done yard work. At trial, Gissendanner's defense primarily consisted of his alibi that he was several miles away at the time the crime was committed and an attempt to show that the crime was committed by a third party, Buster Carr, who had also done yard work for the victim.

[8]Retired Associate Justice Champ Lyons, Jr., was appointed on October 3, 2014, to be a Special Judge in regard to this appeal. See § 12-3-17, Ala. Code 1975.

Counsel's failure to call seven fact witnesses undergirds, in part, the trial court's decision to grant Gissendanner's Rule 32, Ala. R. Crim. P., petition based on ineffective assistance of counsel. Two of those fact witnesses, Gissendanner's father and brother, are alibi witnesses who would testify as to Gissendanner's presence at a place a few miles remote from the scene of the murder on the morning of the commission of the offense. Another witness, Gisssendanner's pastor, would testify as to circumstances that allegedly made it unlikely for Gissendanner to have a motive. Another witness, unrelated to Gissendanner, would testify as to the activities of Carr, who could have been the perpetrator of the crime. Gissendanner's mother would testify as to her role in handling her son's clothes that he wore on the day of the crime. Two other witnesses, one of whom is Gissendanner's ex-wife, would testify as to circumstances dealing with the negotiation of a check drawn on the victim's bank account.

The seminal case on ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing of both ineffective assistance and prejudice to the defendant. The trial court found ineffective assistance after

an examination of counsel's time records that led to its conclusion that there was insufficient pretrial investigation. The trial court then found prejudice based on an analysis of the proposed testimony of these seven witnesses.

The record in the postconviction proceeding includes testimony of Gissendanner's two attorneys in the underlying trial. It is devoid of any examination of those attorneys with respect to their failure to call (a) the two alibi witnesses, (b) the witness who would testify as to circumstances that allegedly made it unlikely for Gissendanner to have a motive, (c) the witness who would describe the activities of Carr who could have committed the murder and (d) two of the three witnesses who would testify as to circumstances dealing with events that occurred after the commission of the murder that allegedly contradicted the prosecution's case. Gissendanner did not testify at the postconviction proceeding.

Gissendanner does not contend that trial counsel was unaware of what he was going to say when he was put on the stand to testify at the underlying trial. Moreover, it would be wholly unreasonable to conclude otherwise, given the

undisputed evidence of multiple conferences with Gissendanner prior to trial.

Gissendanner's testified at the murder trial that he spent the night in a car in the driveway of his parent's house several miles from the scene of the crime because he was locked out of his house. He testified that he entered the house the next morning looking for his brother and did not find him. However, his brother would testify to having met with Gissendanner at the house. I cannot impute ineffective assistance to counsel who fail to seek testimony from a witness that would contradict the information they received from their client. The main opinion cites ample authority for the proposition that trial preparation is substantially influenced by information gained from the defendant.

Gissendanner also testified that he knew his father had not left for work when he entered the house. However, he did not mention any conversation with his father in his testimony. Yet, his father would testify that he also saw Gissendanner that morning and that he had a brief conversation with him. However, at trial, on cross-examination, Gissendanner testified as follows:

> "Q. And from that point on Thursday night and Friday morning you're on your own by yourself?
>
> "A. Yes sir.
>
> "Q. Now, you told us that you were in a Jeep Cherokee, but your testimony is that you were with no one.
>
> "A. Right.
>
> "Q. So that there's nobody that can come in this court room and tell us where you were that night except what you said?
>
> "A. Well, my brother and Bobby Taylor dropped me off at the house."

(Transcript, pp. 1416-17; emphasis added.)

Although Gissendanner did not specifically testify that he did not see anyone once he entered his father's house, his testimony as to the absence of a witness as to his whereabouts after being dropped off at his parents' house is problematic. It is susceptible of two constructions: It could mean that no one could place him at the house during the night or it could mean that no one could place him at the house during the night and after he woke up the next morning. If it is the former, then his testimony does not rule out a conversation with his father. If it is the latter, his father's testimony would be inconsistent with his testimony. In order to affirm the trial

court's ruiling, I must assume the former and find ineffective assistance on a record silent as to counsel’s reason for not calling the father as a witness. This I am unwilling to do, especially where the record reflects that counsel had frequently spoken with Gissendanner's father before the trial, giving rise to what could be described as a deafening silence in this record as to counsel’s reasoning.

Another witness, Gissedanner's mother, would testify that she found the clothes Gissendanner had worn on the day of the murder in the bathroom of her house and she then placed them in a bucket on her porch. The clothes were later found in a trailer occasionally used by Gissendanner. Yet Gissendanner testified that he put the clothes in a basket and placed them on the front porch. Gissendanner did not mention anything about his mother being involved in any way in the placement of the clothes. We must assume that counsel was aware, based on pretrial interviews with Gissendanner, that he would testify that he placed the clothes on the front porch without any involvement of his mother. Once again, it is difficult to impute ineffective assistance to counsel who fail to seek

testimony from a witness that would contradict the information received from their client.

Another witness, Gissendanner's pastor, who also had done yard work for the victim, would testify that the victim's automobile, which was stolen at the time of the crime, was kept in a locked garage behind the house. It is alleged that this testimony would have shown that Gissendanner, who had assisted this witness in doing yard work at the victim's house, could not have known that the victim kept a car in her garage. The record reflects that trial counsel had conversations with this witness before trial. The pastor testified that he never discussed this circumstance with counsel. I cannot conclude that the failure to develop this line of testimony constitutes ineffective assistance or prejudice because the condition and location of the garage at the victim's house is equally probative of the innocence of Carr, who had also done yard work for the victim.

Another witness, not a member of Gissendanner's family, would testify as to having seen Carr in possession of the victim's vehicle at a gas station on the morning of the murder. This witness also testified that he saw Gissendanner

later in the day in the same car. Gissendanner never mentioned in his testimony that he encountered this witness later in the day, so we must assume, based on the barren record, that Gissendanner never apprised his counsel as to either the existence or role of this witness. It is wholly speculative to suggest that additional pretrial investigation, based on the information available to counsel at the time, would have turned up this witness, unrelated to the defendant, who allegedly happened to see Carr with the victim's vehicle at a gas station.

Two other witnesses, one of whom was Gissendanner's ex-wife, would testify as to circumstances surrounding the handwriting on a check. Trial counsel was interrogated about this issue at the postconviction proceeding and the main opinion sufficiently deals with it.

The combined effect of Gissendanner's testimony and the barren record in this proceeding on key issues as to trial counsel's explanation as to the failure to call various fact witnesses is error warranting the reversal of the trial court's order granting Gissendanner's Rule 32 petition. The error associated with the alibi offered by Gissendanner's

brother, the witness who saw Carr with the victim's vehicle, and Gissendanner's mother and her role in dealing with her son's clothes, stems from an improper imposition of a burden on counsel to seek witnesses who were not material based on Gissendanner's version of the facts from her testimony at the underlying trial and that we must assume were the same facts he had previously conveyed to counsel during pretrial preparation. This error, related to the absence of any duty on the part of counsel to ferret out evidence to contradict their client does not implicate considerations that might otherwise apply based on the circumstance here presented, where the judge in the Rule 32 proceedings happened to have been the same judge who presided at the underlying criminal trial. Likewise, the absence in the record of an explanation for counsel's failure to call the father, given the conflicting inferences from Gissendanner's testimony as to availability of corroborative alibi witnesses, cannot be bolstered by the trial court's involvement in the underlying trial. The trial judge's views on the credibility of those four witnesses is therefore simply not relevant in this setting. As for the remaining three witnesses -- the pastor,

the ex-wife and the bank teller -- I cannot conclude that the failure to call any or all of those witnesses justifies a new trial, notwithstanding due deference to the trial court's finding. In so stating, I do not mean to suggest that the trial court would have granted Gissendanner's petition had the failure to call only those witnesses been the sole basis of Gissendanner's petition. I do so for sake of completeness of analysis.

The trial judge is due to be commended for his painstaking deliberations in this challenging proceeding. The entry of an order granting a new trial in a capital-murder case is a matter that no responsible circuit judge would lightly entertain. The fact that a reversal is appropriate in this case should in no way inhibit other judges similarly situated from discharging their duties with the same laudable integrity and courage displayed by the trial judge in this proceeding. The trial judge here did what he deemed required of him under his judicial oath. I am bound by the same oath and I must do likewise, although I reach a different conclusion.

BURKE, Judge, dissenting.

I respectfully dissent in this matter because I am greatly disturbed by the majority opinion's apparent disregard for the trial judge's findings that Emanuel Aaron Gissendanner, Jr., did not receive a fair trial and its reversal of his decision to grant Gissendanner a new trial.

I am very troubled about the precedent set by this case. I know that this dissent is strongly worded, but my strong words are a measure of my genuine concern about this case and are not indicative of any disrespect for my fellow judges on this Court.

I first note that I concur with the well-worded dissent issued by my colleague Judge Joiner. He asserts:

> "When the same judge presides over both the original trial and the postconviction proceedings--as is the case here--that judge may either grant or deny postconviction relief on an ineffective-assistance-of-counsel claim based on that judge's 'own observations' and 'personal knowledge' of trial counsel's actions. See, e.g., Boyd v. State, 913 So. 2d 1113, 1132 (Ala. Crim. App. 2003) ..., and Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989)). Additionally, when the same judge presides over both the original trial and the postconviction proceedings and finds that, under the second prong of Strickland[V. Washington, 466 U.S. 668 (1984)], trial counsel's errors 'resulted in prejudice to [the petitioner], we afford [that] finding considerable weight.' State v. Gamble, 63

> So. 3d 707, 721 (Ala. Crim. App. 2010) (emphasis added).... See also Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012)."

Circuit Judge Kenneth Quattlebaum presided over Gissendanner's capital-murder trial. He heard the testimony of each and every witness as they took the oath and were questioned by the prosecutor and the defense counsel. He ruled on motions and objections by the parties and considered evidence as it was admitted. He observed the jury as it heard the facts of this case during the trial. He had the opportunity to see the quality of the representation of Gissendanner by his attorneys, as well as the actions of the prosecutors. Lastly, after weighing the aggravating circumstances and the mitigating circumstances, he made the difficult determination to pronounce a sentence of death upon Gissendanner in accordance with the jury's recommendation. In short, Judge Quattlebaum personally observed every part of Gissendanner's journey through the substantive portions of Alabama's judicial system.

Now, that same trial judge has held a lengthy hearing on Gissendanner's Rule 32 petition and has entered an order granting him a new trial. Let me say that again: The very

judge who spent immeasurable days overseeing every part of the trial and the hearing sentencing Gissendanner to death found that the first trial was not fair.

Now the majority reverses the judgment of that trial judge and attempts to do the job of the trial judge -- re-weighing the evidence themselves. I am quite unsettled by the majority's willingness to so easily cast aside the decision of the one and only person standing on this Earth whose solemn duty it was to ensure that Gissendanner received a fair trial. Judge Joiner has well covered the relevant law in this matter in his dissent. I will not reassert any of that here. My purpose in writing is to address the fact that unfortunate and harmful precedent that is bound to spring out of the opinion of the majority.

No one, including myself or the trial judge, is asserting that Gissendanner's conviction and sentence be reversed and that he be set free. This case is not about the death penalty. I have consistently voted to uphold the constitutionality of Alabama's death-penalty statute and its method of execution. This case is about making sure that defendants receive fair trials before a court decides whether

to impose the death penalty. The remedy, as ordered by the trial court, is for Gissendanner to have a new trial, i.e., a fair trial. Moses' instructions to the Israelites best set out the standard judges ought to use when exercising their duties. "Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly." (Leviticus 19:15) The record in this case certainly demonstrates that Judge Quattlebaum acted earnestly in his desire to do justice in this matter.

Having served as a trial judge prior to serving on this Court, I must say that there is a very good reason that appellate courts have always afforded great discretion to the decision of a trial judge. Although we have before us the cold written record of the trial, the trial judge actually sees and hears every witness, reviews each and every piece of evidence admitted for consideration by the citizen members of the jury, and hears the arguments of the attorneys. Context, tone, emotion, facial expressions, deception, hesitation, and many other components of testimony and argument witnessed by the trial judge are simply not visible or understandable to the reader of a written record on appeal.

Additionally, let us remember that a trial judge is also an active and visible part of his community. When he visits his local grocery store or worships at his church or synagogue, he may well come face to face with a victim, a family member of a defendant, or even a member of the public who is displeased with one of his decisions. All the more reason that we should respect findings of fact made by a trial judge, who not only has to make the tough call, but has to face the very people his decisions will most impact. When a trial judge declares that a defendant is entitled to a new trial, it is never a decision entered into without great thought and consideration.

Here, the majority of our Court now second-guesses this judge, who made a decision that justice can only be attained only if Gissendanner is given a new trial. What is the message we send to the next trial judge who sincerely believes that someone who has been imprisoned did not receive a fair trial? I fear that we are creating an environment that is hostile to trial judges who follow the law and their consciences.

Lastly, let us not forget that the death sentence has been imposed in this case. As the United States Supreme Court has espoused for more than four decades, "death is different." A death sentence, once carried out, is not modifiable or revokable in this life, absent the divine hand of The Creator. Is Gissendanner to be sent to his execution even as we ignore the findings of the very judge who sentenced him to death?

This case is simple in its reality. Let us give Emanuel Aaron Gissendanner, Jr. an opportunity to have a fair trial. If convicted at that fair trial, then let him suffer the due and just punishment for his crime as determined by a jury of his peers and the trial judge, even if that punishment be death. But let us not look over his grave with anything less than the steadfast conviction that justice was done.

Although I am firmly opposed to today's decision of the majority reversing the judgment of the trial court, I pray that they are right and I am wrong. God help us if they are not.

JOINER, Judge, dissenting.

I respectfully dissent from this Court's opinion reversing the circuit court's order granting Emanuel Aaron Gissendanner, Jr.'s, Rule 32, Ala. R. Crim. P., petition for postconviction relief.

Gissendanner, an inmate on death row, timely filed a postconviction petition challenging his capital-murder conviction and death sentence, alleging, among other things, that his trial counsel were ineffective because, he said, his counsel failed "to conduct any meaningful investigation ... to prepare for the guilt phase of trial." (C. 43.) The circuit court, after conducting an evidentiary hearing, issued a written order granting Gissendanner's petition, finding, in part, that Gissendanner's trial counsel were constitutionally ineffective during the guilt phase of trial because, it said, Gissendanner's trial counsel "neglected their investigative duties and failed to interview potential witnesses, family members, or State's witnesses" and that "[t]here was no reasonable decision that made their investigation unnecessary." (C. 1126.)

The circuit court, after setting out the testimony of those "potential witnesses" in great detail and explaining how their testimony created reasonable doubt as to Gissendanner's guilt, concluded that

> "there is a reasonable probability that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. It is clear to this court that this probability is sufficient to and, in fact does, undermine confidence in Gissendanner's conviction and death sentence."

(C. 1184.) For the reasons set forth below, I dissent from the main opinion and would affirm the order of the circuit court and allow Gissendanner a new trial.

Standard of Review

The main opinion correctly explains that when reviewing claims of ineffective assistance of counsel "the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." Strickland v. Washington, 466 U.S. 668, 698 (1984). When the same judge presides over both the original trial and the postconviction proceedings--as is the case here--that judge may either grant or deny postconviction relief on an ineffective-assistance-of-counsel claim based on that judge's "own observations" and "personal

knowledge" of trial counsel's actions. See, e.g., Boyd v. State, 913 So. 2d 1113, 1132 (Ala. Crim. App. 2003) ("Moreover, the judge presiding over the Rule 32 proceedings also presided over Boyd's trial and dismissed this claim based on his own observations and his personal knowledge that Boyd's counsel were prepared and did mount a reasonable defense on Boyd's behalf.") (citing Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991), and Sheats v. State, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989)). Additionally, when the same judge presides over both the original trial and the postconviction proceedings and finds that, under the second prong of Strickland, trial counsel's errors "resulted in prejudice to [the petitioner], we afford [that] finding considerable weight." State v. Gamble, 63 So. 3d 707, 721 (Ala. Crim. App. 2010) (emphasis added) (applying the "considerable weight" standard and affirming the circuit court's order granting Gamble's postconviction petition based on ineffective assistance of counsel and citing Francis v. State, 529 So. 2d 670, 673 n.9 (Fla. 1988) ("Postconviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight." (emphasis

added))). See also Washington v. State, 95 So. 3d 26, 53 (Ala. Crim. App. 2012) (applying the "considerable weight" standard and affirming the circuit court's order denying Washington's postconviction claim of ineffective assistance of counsel).

The main opinion contends that applying the "considerable-weight" standard used in Gamble and Washington to a circuit court's determination that a petitioner suffered prejudice as a result of counsel's deficient performance during the guilt phase of a capital-murder trial reads those cases "too broad[ly]." ___ So. 3d at ___. I do not read those cases, however, as limiting the "considerable-weight" standard to only those instances in which the circuit court finds prejudice during the penalty phase of trial.

In Gamble, this Court based its "considerable-weight" standard on the Florida Supreme Court's decision in Francis v. State, supra, in which the Florida Supreme Court, although addressing "prejudice" in the context of sentencing, noted, rather broadly, that

> "[t]he judge who heard this motion presided at Francis' third trial. Who, better than he, could determine whether failure to introduce this evidence prejudiced Francis sufficiently to meet the

> Strickland v. Washington test? Postconviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight."

529 So. 2d at 673 n.9. There is no language in Gamble, Washington, or Francis that limits the "considerable-weight" standard to only the penalty phase of a capital-murder trial. Application of the "considerable-weight" standard in cases where the circuit court grants postconviction relief for guilt-phase ineffective assistance of counsel is consistent with Gamble, Washington, and Francis.[9]

Discussion

As set out above, Gissendanner argued in his Rule 32 petition that his trial counsel were ineffective for failing to investigate and to interview potential alibi witnesses essential to his defense.

With regard to ineffective-assistance-of-counsel claims, this Court has held:

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[9]Although the main opinion limits the "considerable-weight" standard to findings of penalty-phase prejudice, the main opinion fails to apply, or even to mention, the "considerable-weight" standard when it reverses the circuit court's order, which concludes that Gissendanner was prejudiced by his counsel's deficient performance during the penalty phase of his trial.

"'"In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> "'"'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that

> renders the result unreliable.'
>
> "'"466 U.S. at 687, 104 S. Ct. at 2064.
>
> "'"'The performance component outlined in Strickland is an objective one: that is, whether counsel's assistance, judged under "prevailing professional norms," was "reasonable considering all the circumstances."' Daniels v. State, 650 So. 2d 544, 552 (Ala. Cr. App. 1994), cert. denied, [514 U.S. 1024, 115 S. Ct. 1375, 131 L. Ed. 2d 230 (1995)], quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. 'A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.' Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.
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> "'"The claimant alleging ineffective assistance of counsel has the burden of showing that counsel's assistance was ineffective. Ex parte Baldwin, 456 So. 2d 129 (Ala. 1984), aff'd, 472 U.S. 372, 105 S. Ct. 2727, 86 L. Ed. 2d 300 (1985). 'Once a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part, the

court must determine whether those acts or omissions fall "outside the wide range of professionally competent assistance." [Strickland,] 466 U.S. at 690, 104 S. Ct. at 2066.' Daniels, 650 So. 2d at 552. When reviewing a claim of ineffective assistance of counsel, this court indulges a strong presumption that counsel's conduct was appropriate and reasonable. Hallford v. State, 629 So. 2d 6 (Ala. Cr. App. 1992), cert. denied, 511 U.S. 1100, 114 S. Ct. 1870, 128 L. Ed. 2d 491 (1994); Luke v. State, 484 So. 2d 531 (Ala. Cr. App. 1985). 'This court must avoid using "hindsight" to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance.' Hallford, 629 So. 2d at 9. See also, e.g., Cartwright v. State, 645 So. 2d 326 (Ala. Cr. App. 1994).

> "'"'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court,

> examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even

> the best criminal defense attorneys would not defend a particular client in the same way."
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> "'"Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 (citations omitted). See Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987).
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> > "'"'Even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless he establishes that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Strickland,] 466 U.S. at 694, 104 S. Ct. at 2068.'
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> > "'"Daniels, 650 So.2d at 552.
> >
> > "'"...."
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> "'Bui v. State, 717 So. 2d 6, 12-13 (Ala. Cr. App. 1997), cert. denied, 717 So. 2d 6 (Ala. 1998).'

> "Dobyne v. State, 805 So. 2d 733, 742-44 (Ala. Crim. App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001)."

Broadnax, 130 So. 3d at 1246-47. Applying the above-articulated principles to the circumstances in this case, I agree with the circuit court's conclusion that Gissendanner's trial counsel were ineffective during the guilt-phase of the proceedings for failing to investigate and interview potential witnesses that were essential to Gissendanner's sole defense.

I. Deficient Performance

Gissendanner, in his Rule 32 petition, alleged that his counsel's performance "fell below 'an objective standard of reasonableness' and 'failed to make the adversarial testing process work,'" (C. 42 (quoting Strickland, 466 U.S. at 690)), because, he said, his trial counsel "failed to conduct any meaningful investigation ... in order to prepare for the guilt phase of trial." (C. 43.) Specifically, Gissendanner alleged that his trial counsel "failed to interview witnesses, family, and friends who could have provided information essential to an adequate defense of [Gissendanner]." (C. 43.)

With respect to trial counsel's duty to investigate, this Court has held:

> "'While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, "this duty only requires a reasonable investigation." Singleton v. Thigpen, 847 F.2d 668, 669 (11th Cir. (Ala.) 1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 822, 102 L. Ed. 2d 812 (1989) (emphasis added). See Strickland, 466 U.S. at 691, 104 S. Ct. at 2066; Morrison v. State, 551 So. 2d 435 (Ala. Cr. App. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990). Counsel's obligation is to conduct a "substantial investigation into each of the plausible lines of defense." Strickland, 466 U.S. at 681, 104 S. Ct. at 2061 (emphasis added). "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." Id., 466 U.S. at 686, 104 S. Ct. at 2063.'

"Jones v. State, 753 So. 2d 1174, 1191 (Ala. Crim. App. 1999).

> "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the

> circumstances, applying a heavy measure of deference to counsel's judgments.'

"Strickland v. Washington, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"'The reasonableness of the investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."' St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir. 2006) (quoting Wiggins v. Smith, 539 U.S. 510, 527, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)). '[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place....' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000). Finally:

> "'The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even

> harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, [199 U.S. App. D.C. 359,] 372-373, 624 F.2d [196,] 209-210 [(D.C. 1976)].'

"Strickland, 466 U.S. at 691, 104 S. Ct. 2052."

Broadnax, 130 So. 3d at 1248. In other words, we must look first to what trial counsel actually did to investigate plausible lines of defense and, thereafter, we must determine whether trial counsel's actions were reasonable.

Here, with regard to Gissendanner's trial counsel's pretrial investigation, the circuit court found as follows:

> "[Kominos] and [Gallo] ... represented Gissendanner at trial. Kominos documented at most nine hours spent with Gissendanner in the more than [two] years between the time he turned himself over to the police for questioning pertaining to the victim's car and the time of his capital murder trial. See Hr'g Ex. 3 (Kominos timesheets) at 003-577-580 (showing 5 total meetings on 6/26/01 (2.5 hours), 6/27/01 (1.5 hours), 7/3/01 (1 hour), 1/8/03(1 hour) and 7/31/03 (3 hours). No time at all was documented with Gissendanner after the first week of his custody for more than 18 months, until January 2003.
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> "At the Rule 32 hearing, Kominos verified that these time sheets accurately reflected his time

spent with Gissendanner to work on his defense. See Hr'g Tr. 38.18 ('By signing it, I'm committed to that'); id. at 38:19-21 ('Q: And it's an accurate description of the services that you rendered? A: Yes.'); id. at 79:15-21 (verifying that the only thing the Court can look at to determine how much time he spent is the sworn timesheet). While Kominos testified that he would sometimes visit with Gissendanner if they were at the Dale County Jail to see another client, Kominos stated that during those visits, he did not have Gissendanner's files with him. See Hr'g Tr. At 78:19-79:2.

"Gallo, responsible primarily for the mitigation phase, similarly documented at most 7.7 hours spent with Gissendanner in 4 meetings over the more than 2 years before trial. Hr'g Ex. 45 (Gallo timesheets) at 003-566-567 (showing 4 total meetings on 6/26/01 (2.3 hours), 7/3/01 (1 hour), 7/24/01 (2 hours, only some spent with client); and 1/15/03 (2.4 hours, only some spent with client). No time at all was documented with Gissendanner after the first month of his custody for more than 17 months, until January 2003. Mr. Gallo also verified at the Rule 32 hearing that his timesheets represent the only way to know how much time he spent putting together Gissendanner's defense. Hr'g Tr. At 91:6-94:11.

"At most 3 hours was spent by defense counsel interviewing two potential witnesses for the defense, and no such interview took place until more than 18 months after Gissendanner's arrest for murder (see Hr'g Ex.3 (Kominos timesheets) at 003-579-580 (two conferences with A. Sitz on 1/10/03 (1 hour) and 4/16/03 (1 hour); conference with Gissendanner's father on 6/12/03 (1 hour)). No time was spent interviewing the witnesses that the State had disclosed would be testifying for the prosecution. See id. Furthermore, while trial counsel sought--15 months after Gissendanner's arrest--funds for the use of an investigator for 30 hours (see Hr'g Ex. 4 (9/30/02 Motion for Funds)),

and while that request was promptly granted (Hr'g Ex. 5 (10/7/02 Order)), that investigator eventually spoke with only two potential witnesses--Pete Cole and Albert Sitz--and used at most 4.75 hours in actually speaking with those potential witnesses. See Hr'g Ex. 6 (Investigator timesheets) at 003-568 (showing in-county interview with Pete Cole (a portion of the 2.25 hours billed that day) and interview with Albert Sitz (a portion of the 2.5 hours billed that day)).

"Thus, outside of a limited meeting with Gissendanner's father, trial counsel did not speak with any of the factual witnesses who provided testimony at the Rule 32 hearing, even though each was available and even though two of them were disclosed as State witnesses before the trial commenced:

> "• Joshua 'Anton' Gissendanner. Hr'g Tr. at 173:9-13; 176:6-19; 207:18-208:1 . (no one from his brother's legal team attempted to contact him).
>
> "• Rebecca Gissendanner. Id. at 268:18-269:23 (her son's attorneys never contacted her to discuss the facts of the case.)
>
> "• Olympia Gissendanner. Id. at 492:6-493:1 (her brother's attorney never contacted her).
>
> "• Charles Brooks. Id. at 471:12-16 (would have been willing to share information if he had been contacted by trial counsel).
>
> "• State witness Kim Gissendanner. Id. at 498:11-15 (her ex-husband's attorney never contacted her prior to trial).

> "• State witness Pastor David Brown. Id. at 150:5-152:23; 164:5-23 (testimony regarding his three attempts to contact Kominos without being questioned about his factual knowledge).
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> "These witnesses--including witnesses the State disclosed would be part of its case against Gissendanner--had important evidence they were willing to share that trial counsel could easily have discovered to discredit the State's case and to support Gissendanner's defense."

(C. 1121-24.) Thereafter, the circuit court examined caselaw discussing a trial counsel's failure to conduct pretrial investigation and concluded:

> "Here, family members, friends and acquaintances were never interviewed by defense counsel. In multiple contexts, courts have found [ineffective assistance of counsel] where counsel failed to investigate or interview the identified acquaintances of a defendant, where such investigation would have led to the discovery of important evidence. See Code v. Montgomery, 799 F.2d 1481, 1483 (failure to adequately interview defendant's mother or defendant's girlfriend); Baxter v. Thomas, 45 F.3d 1501, 1513 (11th cir. 1995) (failure to interview defendant's sister, neighbor, and social worker).
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> "Applying the above cited law to the finding of facts this court concludes that defense counsel's performance was deficient."

(C. 1127.)

In addressing the circuit court's finding of deficient performance, the main opinion, in Part II.A., suggests that

the State argues in its brief on appeal "that the circuit court erroneously concluded that Gissendanner's attorneys were per se ineffective based on the number of hours they billed for work they performed on Gissendanner's case." ___ So. 3d at ___ (emphasis added). After framing the State's argument in this manner, the main opinion concludes that the "circuit court erred in finding that Gissendanner's attorneys were per se ineffective based on the amount of time documented on their attorney-fee declarations" ___ So. 3d at ___ (emphasis added), and also concludes that the "circuit court erred in concluding that Gissendanner's attorneys were per se ineffective based on counsel's failure to interview Gissendanner's entire family." ___ So. 3d at ___ (emphasis added). The main opinion's framing of the State's argument on appeal and its assertion that the circuit court found Gissendanner's trial counsel to be "per se ineffective," however, are, at best, gross mischaracterizations.

The State actually argues in its brief on appeal that "[t]he Rule 32 court's judgment was clouded by the erroneous belief that it could only determine what trial counsel did in preparation for the trial by reviewing trial counsel's fee

declarations." (State's brief, p. 28.) Clearly, the State does not argue that the circuit court found Gissendanner's trial counsel to be per se ineffective; rather, the State argues that the circuit court improperly weighed the evidence presented at the evidentiary hearing. Additionally, the circuit court did not find, as the main opinion concludes, that Gissendanner's trial counsel were "per se ineffective" based solely on the amount of time documented on their attorney-fee declarations or their failure to interview Gissendanner's "entire family"; rather, as quoted above, the circuit court concluded that Gissendanner's trial counsel's performance was deficient because trial counsel failed to conduct a reasonable investigation into Gissendanner's defense. To reach that conclusion the circuit court cited as evidence, among other things, the lack of time spent investigating Gissendanner's case as reflected in his trial counsel's fee-declaration sheets and also cited the testimony of Gissendanner's family and friends stating that they had not been contacted by Gissendanner's trial counsel.

The circuit court simply did not find trial counsel "per se ineffective," and the main opinion's mischaracterization of

the circuit court's conclusions and the State's argument on appeal is a "straw man" the main opinion has set up to divert attention from the circuit court's actual findings.[10]

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[10]In an attempt to explain its mischaracterizations and address my writing, the main opinion, unsurprisingly, mischaracterizes my writing. Specifically, the main opinion frames my writing as contending that "the circuit court did not find defense counsel's performance to be per se deficient." ___ So. 3d at ___ (some emphasis in original; some emphasis added). Of course, as set out above, I do not contend that the main opinion mischaracterizes either the State's argument on appeal or the circuit court's order as finding trial counsel to be "per se deficient"; rather, as clearly expressed above, I contend that the main opinion mischaracterizes both the State's argument and the circuit court's order by concluding that they are based on a finding of trial counsel's being "per se ineffective." Of course, a finding of "per se deficient" is far different from a finding of "per se ineffective." The former is a finding as to only the first prong of Strickland while the latter is a finding as to both prongs of Strickland.

Regardless of how the main opinion chooses to characterize the State's argument or the circuit court's order, to say that the circuit court found trial counsel either "per se ineffective" or "per se deficient" based solely on trial counsel's fee-declaration sheets is simply not accurate.

Although the main opinion concludes that

> "[i]t appears that the circuit court found that the individuals listed in the order were not interviewed by defense counsel in preparation for trial because the fee sheets reflect that counsel spent an inadequate amount of time preparing the case for trial"

When the State's argument--that Gissendanner's trial counsel "testified that their fee declarations did not reflect all of the time spent investigating and preparing for Gissendanner's trial" (State's brief, p. 28)[11]--is correctly characterized, that argument truly amounts to nothing more than the State arguing that there existed a conflict in the testimony at the evidentiary hearing. The circuit court, however, resolved that conflict adversely to the State. Because there was evidence presented at the Rule 32 hearing that supports the circuit court's finding that Gissendanner's

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___ So. 3d at ___, this conclusion wholly ignores the circuit court's citations to and summations of the portions of the family members' testimony establishing that they were not interviewed by Gissendanner's trial counsel. The testimony of the family members--not just the fee-declaration sheets--establishes that Gissendanner's trial counsel did not interview those witnesses.

[11]The State also argues, in its brief on appeal, that "[t]he Rule 32 court's judgment was clouded by the erroneous belief that it could only determine what trial counsel did in preparation for the trial by reviewing trial counsel's fee declarations." (State's brief, p. 28.) The circuit court did not, as the State contends, find that Gissendanner's trial counsel's performance was deficient based solely on the fee-declaration sheets. In fact, as set out above, the circuit court's order clearly shows that it based its decision not only on the fee-declaration sheets, but also on the testimony of several witnesses who stated that Gissendanner's trial counsel did not speak with them about the case.

trial counsel failed to interview potential witnesses, this Court cannot conclude that the circuit court's finding that Gissendanner's trial counsel failed to interview potential witnesses was "clearly erroneous," see Broadnax, supra; therefore, we must give deference to the circuit court's factual findings regarding the extent of Gissendanner's trial counsel's pretrial investigation.

In other words, we must conclude, as the circuit court did, that Gissendanner's trial counsel failed to interview potential alibi witnesses.[12] Thus, the question we must decide

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[12]Although the main opinion notes that "the State's theory of the case [was] that Gissendanner killed the victim in the early morning hours of June 22, 2001," ___ So. 3d at ___ n.5, the main opinion concludes that the witnesses' testimony at the Rule 32 hearing as to Gissendanner's whereabouts in the early morning hours of June 22, 2001, "was not true alibi evidence." ___ So. 3d at ___. This conclusion not only flies in the face of common sense it also upends the very definition of alibi evidence.

The circuit court, in its order granting Gissendanner's petition, set out in great detail the State's theory of the crime, including the State's timeline of events. Comparing the State's theory and timeline to the testimony of the witnesses at the Rule 32 hearing, the circuit court found that those witnesses "could have testified that they saw Gissendanner in Johntown on Friday morning during a period of time in which the crime was shown by the State's evidence to have been committed." In short, if these witnesses did not truly present alibi evidence, nothing is alibi evidence.

under the performance component of Strickland is not whether Gissendanner's trial counsel failed to interview potential alibi witnesses--it is clear they did not. Rather, the question is whether it was reasonable for Gissendanner's trial counsel not to interview those witnesses.

As discussed above, the reasonableness of trial counsel's pretrial investigation involves not only "'"the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."'" Broadnax, supra (quoting St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir. 2006), quoting in turn Wiggins v. Smith, 539 U.S. 510, 527 (2003)). Additionally, "'[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.'" Id. (quoting Strickland, 466 U.S. at 691).

The main opinion summarizes Gissendanner's trial testimony as follows:

> "At trial, Gissendanner testified in his own defense that on the evening of June 21, 2001, he was with his brother, Jason Covington, and a cousin, Kevin McDaniel, at a birthday party in Johntown. They left the party at 11:00 p.m., he said, and they dropped him off at his father's house. He could not get into the house, he said, because the door was locked so he slept in his brother's Jeep Cherokee

sport-utility vehicle in the front yard. Gissendanner testified, that, at around 7:00 or 7:30 the next morning, June 22, 2001, he got up and went into his father's house to see if his younger brother had any cigarettes. Gissendanner did not testify whether he saw or spoke to anyone in his parent's house that morning. Because his brother was not at his parent's house, he said, he walked down the road to another brother's house. No one came to his brother's door so he started walking back to his parent's house when a 'white guy' he knew as 'Buster' drove by in a white Oldsmobile automobile. Buster pulled up beside him and asked him for drugs. He told Buster that he did not have any drugs with him. Buster asked him if he wanted to rent the car for the day. Gissendanner testified that he gave Buster $50 so that he could use the Oldsmobile for the day. Gissendanner said that he noticed something like mud on the back bumper of the car, and he took a sock from his pocket and wiped it off. He said that Buster told him that he had hit a dog with the car. He drove the car around for the day and the car kept stalling, so he left the car in the front yard of a friend's house. The car was towed. The next morning, he said, Buster asked him to cash a check for him. He said that the check was blank and that Buster filled in the amount and the payee. The check was on Snellgrove's account and was made out to Gissendanner for $927. Gissendanner testified that he paid a friend to take him to SouthTrust Bank so that he could cash the check, but the check was not signed and the teller would not cash the check. He went back to where Buster told him to meet him and Buster took the check inside the house and came back with it signed. Gissendanner went back to the bank and cashed the check. He said that he gave Buster $950 by mistake. Gissendanner identified the clothes found in the trailer as his but said that he put the clothes in a white bucket on his parents's front porch and he did not put those clothes in the trailer."

___ So. 3d at ___.

Before assessing the reasonableness of trial counsel's actions, it must be noted that the main opinion's characterization of Gissendanner's trial testimony creates an incorrect implication. Specifically, the main opinion states that "Gissendanner did not testify whether he saw or spoke to anyone in his parent's house that morning," ___ So. 3d at ___, and by doing so implies that Gissendanner's testimony demonstrated that no one was at Gissendanner's father's house the morning of June 22, 2001. Gissendanner's trial testimony, however, paints a different picture; at trial, Gissendanner testified as follows:

> "[Gissendanner]: I sat on the porch, waited, knocked again. No one came. So I got tired of waiting. I just slept in my brother's Jeep Cherokee which is in the front yard.
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> "[Gissendanner's trial counsel]: Your brother has a Jeep Cherokee. It's in the front yard of your father's house?
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> "[Gissendanner]: Yes, sir.
>
> "[Gissendanner's trial counsel]: Or it was?
>
> "[Gissendanner]: Yes, sir.
>
> "[Gissendanner's trial counsel]: So you got in the car?

"[Gissendanner]: Yes, sir.

"[Gissendanner's trial counsel]: You went to sleep?

"[Gissendanner]: Yes, sir.

"[Gissendanner's trial counsel]: Okay. That was Thursday night?

"[Gissendanner]: Yes, sir.

"[Gissendanner's trial counsel]: Friday morning about what time did you wake up in that Jeep Cherokee?

"[Gissendanner]: It had to have been a little after seven because my dad usually goes to work at eight. And he don't leave until around about fifteen till eight. So it would have been between--somewhere between 7 and 7:30.

"[Gissendanner's trial counsel]: Okay. So your dad--does your dad drive?

"[Gissendanner]: Yes, sir.

"[Gissendanner's trial counsel]: What kind of car did he have back then?

"[Gissendanner]: I think he had a brown Ford Taurus.

"[Gissendanner's trial counsel]: Okay. So that car was still in the driveway or in the yard?

"[Gissendanner]: Yes, sir.

"[Gissendanner's trial counsel]: And so you knew that your daddy hadn't left and gone to work yet?

"[Gissendanner]: Right.

> "[Gissendanner's trial counsel]: And you say it was about what time, seven?
>
> "[Gissendanner]: Between 7 and 7:30.
>
> "[Gissendanner's trial counsel]: Between 7 and 7:30?
>
> "[Gissendanner]: Yes, sir.
>
> "[Gissendanner's trial counsel]: All right. And what are you wearing at this time, Emanuel?
>
> "[Gissendanner]: I had on a pair of brown pants, some brown sandals, and a red polo shirt.
>
> "[Gissendanner's trial counsel]: Okay. And when you wake up in the Jeep Cherokee in your father's front yard, what do you do next?
>
> "[Gissendanner]: Well, I get out the car. I didn't have no more cigarettes. So I went inside the house see if my little brother had some cigarettes. But he had already left, I think to go to school, so I went back outside. I went to my other brother's house, which is down the road from where we stay at, where my parents stayed at. Knocked on his door. I guess he was still in the bed, his wife still in the bed. No one came to the door."

(Record on Direct Appeal, R. 1368-70 (emphasis added).) Clearly, Gissendanner's testimony demonstrated that his father's car was at the house and that his father likely was at home as well. Any implication that Gissendanner thought no one was at the house is misleading.

Based only on the main opinion's characterization of Gissendanner's trial testimony, one must conclude that his trial counsel, at a minimum, were aware of Gissendanner's interactions, or possible interactions, with Jason Covington; Kevin McDaniel; his younger brother; Buster Carr; Gissendanner's father and anyone who lived in Gissendanner's father's house; and a bank teller at SouthTrust Bank. Additionally, based on Gissendanner's actual trial testimony, Gissendanner's trial counsel should have been aware of Gissendanner's interactions with the following people: Queen Ester (record on direct appeal, R. 1377); Mr. Hardy at the fishing pond (record on direct appeal, R. 1378); Bernard (record on direct appeal, R. 1378); Bernard's sister (record on direct appeal, R. 1378); "[t]he three girls" at "the three girls' house," with whom Gissendanner testified he smoked marijuana and went to purchase beer (record on direct appeal, R. 1378); a Clio Police Officer who Gissendanner testified asked if he needed assistance to "jump off" the vehicle when it died (record on direct appeal, R. 1382); the two older people who were across the street and who assisted Gissendanner when the Oldsmobile died (record on direct

appeal, R. 1383); the "white guy" who charged Gissendanner's car battery (record on direct appeal, R. 1384); Ms. Linda (record on direct appeal, R. 1385); Coley McRainey (record on direct appeal, R. 1385); the "other" Emanuel (record on direct appeal, R. 1385); employees at the "Toy Box" (record on direct appeal, R. 1385-86); Charles Kidd (record on direct appeal, R. 1387); Mr. Pete (record on direct appeal, R. 1394); Natalie Holmes (record on direct appeal, R. 1399, 1438); Ms. Willie Dean Crittendon (record on direct appeal, R. 1400); employees at the hotel Gissendanner stayed at in Montgomery (record on direct appeal, R. 1400); Gissendanner's ex-wife (record on direct appeal, R. 1400); Gissendanner's sister (record on direct appeal, R. 1400); Gissendanner's mother (record on direct appeal, R. 1401); and Reverend Brown (record on direct appeal, R. 1404).

Certainly, it would have been reasonable for Gissendanner's trial counsel to, at least, interview the individuals related to Gissendanner because they could--and did--have information beneficial to Gissendanner's alibi

defense.[13] Gissendanner's trial counsel, however, failed to interview any potential alibi witnesses. This failure was unreasonable, especially in light of the fact that Gissendanner's only plausible defense was an alibi. See Bryant v. Scott, 28 F.3d 1411, 1415 (5th Cir. 1994) ("[W]hen alibi witnesses are involved, it is unreasonable for counsel not to try to contact the witnesses and 'ascertain whether their testimony would aid the defense.'") (quoting Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991)).

In Bryant, the United States Court of Appeals for the Fifth Circuit held that trial counsel was ineffective for failing to investigate an alibi defense, finding:

> "When Moore [Bryant's trial counsel] first met Bryant in January of 1983, Bryant wanted Moore to subpoena twenty-five 'material' witnesses for his defense. At subsequent meetings, Moore continually asked Bryant for the names and addresses of Bryant's alibi witnesses, but Bryant failed to disclose such information, indicating that friends of his in California were 'getting that [information] together.'• Therefore, while Moore did not acquire

[13]I do not believe that a pretrial investigation that would satisfy the first prong of Strickland requires trial counsel to chase every rabbit trail in an attempt to uncover potentially favorable evidence. I do, however, believe that trial counsel should at least attempt to corroborate his or her client's testimony by speaking with readily available and easily discoverable witnesses.

the names or addresses of Bryant's alibi witnesses at their meetings, he was cognizant of Bryant's interest in pursuing an alibi defense. Then, at the pretrial hearing, Moore learned from Bryant's testimony that Stanley Woods, and Harold and Teresa Wilson were potential alibi witnesses. Also during the pretrial hearing, Moore had the opportunity to review the notes of Sergeant Metzger of the Oakland Police Department, who had interviewed Stanley Woods concerning Bryant's whereabouts in California. Sergeant Metzger's notes contained Woods'[s] name, address, and telephone number and indicate that Bryant 'worked for [Woods] during the month of May--beg[inning the] 13-14'•and continuing through the end of the month. Record on Appeal, vol. 1, at 115-18. Although Moore testified that Bryant never let him review the notes introduced at the pretrial hearing, the record shows that these items were delivered to Moore in open court. Thus, between Bryant's testimony and the police investigation notes, Moore had enough information, on March 18, 1983, to try to contact Mr. Woods and the Wilsons about Bryant's alibi defense.

"The trial court's findings--that Moore did not know the names, addresses, or phone numbers of alibi witnesses before trial, nor had the opportunity to interview such witnesses--are not fairly supported by the record, because Moore learned of Stanley Woods and Mr. and Mrs. Wilson at the pretrial hearing on Friday, March 18, 1983, almost seventy-two hours before trial. Thus, the record shows that Moore had information on potential alibi witnesses before trial, and had the opportunity to try to interview such witnesses.

"Bryant testified at the pretrial hearing that he wanted to subpoena out-of-state witnesses because he understood the trial court to have determined 'that affidavits wouldn't be any good here in this court, so [subpoenaing witnesses is] my only defense.' State Record, vol. 2, at 26. During a

recess in the pretrial hearing, Moore discussed the procedure for subpoenaing out-of-state witnesses with Judge Fitts. Despite Bryant's clear reliance on an alibi defense, Moore admitted that he did not try to contact potential alibi witnesses in California. Moore abdicated his responsibility of investigating potential alibi witnesses and failed to 'attempt to investigate and to argue on the record for the admission of the alibi witnesses' testimony.'• Grooms v. Solem, 923 F.2d 88, 91 (8th Cir. 1991). Moore's failure to investigate potential alibi witnesses was not a 'strategic choice' that precludes claims of ineffective assistance. See Nealy, 764 F.2d at 1178 (according deference to counsel's strategic decisions). Moore stated that he 'would have loved to have had the [alibi] evidence' and that 'it would have been a different type of trial if we had some alibi witnesses.'• Record on Appeal, vol. 2, at 190, 206. Even if Moore had first learned of the alibi witnesses on the first day of trial, he 'nevertheless should have contacted the witnesses and made his record to the trial court as to the significance of the alibi and the fact that it was newly discovered.' Grooms, 923 F.2d at 91. Since Moore was aware of Bryant's interest in pursuing an alibi defense, and was given enough information to contact Woods in California, it was incumbent upon Moore to at least try to contact Woods in California. The record also reveals that Bryant was a friend of Harold Wilson for about two years before the robbery, and most probably knew the first names of 'Mr. and Mrs. Wilson.'• Record on Appeal, vol. 1, at 102-03. Moore should have asked Bryant for the first names of Mr. and Mrs. Wilson, so that he could have tried to contact them in California. Additionally, Bryant is serving a sentence of life imprisonment for his participation in the robbery, and given the seriousness of the offense and the gravity of the punishment, counsel should have tried to investigate the potential alibi witnesses. Cf. Loyd v. Whitley, 977 F.2d 149, 157 (5th Cir. 1992) (stating that 'defense counsel's

> failure to pursue a crucial line of investigation in a capital murder case was not professionally reasonable'), cert. denied, 508 U.S. 911, 113 S. Ct. 2343, 124 L. Ed. 2d 253 (1993).
>
> "Thus, we disagree with the district court's conclusion that Moore was 'hog-tied' or 'stonewalled' from making any investigation of alibi witnesses. Moore knew of three alibi witnesses before trial and should have made some effort to contact or interview these people in furtherance of Bryant's defense. Moore's complete failure to investigate alibi witnesses fell below the standard of a reasonably competent attorney practicing under prevailing professional norms."

Bryant, 28 F.3d at 1415-18 (footnotes omitted).

Similarly, in Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986), the United States Court of Appeals for the Eleventh Circuit held that trial counsel was ineffective for failing to investigate Code's alibi defense, finding:

> "Attorney Stacy interviewed one defense witness: he telephoned Code's mother. He attempted to phone Code's girl friend, Mary Jackson, and testified that he 'might have' interviewed one of the five prosecution witnesses. Although he knew that Code's exclusive defense was based on an alibi, Stacy never asked Code's mother where Code was on April 1, 1974, the day of the robbery. Had he asked, he would have learned that although Code's mother had no personal knowledge of Code's whereabouts on April 1, she could have provided him with leads regarding alibi witnesses. Moreover, during the phone conversation, Code's mother indicated she could not attend Code's trial that coming Monday. Stacy made no attempt to subpoena her even though she was the only potential defense witness with whom he spoke and he

> erroneously believed she could provide Code's alibi. Instead, he suggested to Code, who was incarcerated, that Code secure his mother's presence at trial.
>
> "In his deposition in the district court, Stacy testified that he didn't think it necessary to go to Macon to locate Code's girl friend or other alibi witnesses or to ensure Mrs. Code's presence at trial: 'I just don't think I'm required as a practicing attorney to be a taxi boy.' Stacy also testified that due to a personality clash, he had to 'swallow his pride' in order to represent Code.
>
> "....
>
> "Under these circumstances we conclude that a competent attorney relying on an alibi defense would have asked Code's mother if she could corroborate the alibi; would have subpoenaed a reluctant witness whom he thought could provide an alibi and would have asked either the witness or the defendant if there were other alibi witnesses. Moreover, a reasonably effective attorney would have broadened his investigation once Mrs. Code indicated she was unavailable to testify. Even if Mrs. Code had appeared, Stacy had not investigated to the point where he would have discovered that she was not an alibi witness. See United States v. Moore, 554 F.2d 1086, 1093 (D.C. Cir. 1976) ('counsel's anticipation of what a potential witness would say does not excuse the failure to find out')."

Code v. Montgomery, 799 F.2d 1481, 1483-84 (11th Cir. 1986).

Here, as in Bryant and Code, Gissendanner's sole, plausible defense was an alibi defense. As discussed above, the only preparation Gissendanner's trial counsel conducted before trial was to interview two potential witnesses--Albert

Sitz and Gissendanner's father. Gissendanner's trial counsel also hired an investigator who "eventually spoke with two potential witnesses--Pete Cole and Albert Sitz." (C. 1122-23.) In other words, Gissendanner's trial counsel had information from only three witnesses--Gissendanner's father, Cole, and Sitz.

Notably, although Gissendanner's trial counsel spoke with Gissendanner's father, trial counsel did not ask him about his knowledge of Gissendanner's whereabouts or activities the morning that Snellgrove was murdered and, moreover, did not call Gissendanner's father to testify during the guilt-phase of Gissendanner's trial. Additionally, although the investigator hired by Gissendanner's trial counsel interviewed Cole, Cole did not testify during the guilt-phase of Gissendanner's trial. In fact, Sitz was the only witness whom Gissendanner's trial counsel interviewed before trial who actually testified during the guilt-phase of Gissendanner's trial.

At trial, Sitz, who was in the custody of the Alabama Department of Corrections and who testified while wearing "white prison clothes and handcuff[s]" (record on direct

appeal, R. 1353), did not testify to Gissendanner's whereabouts or activities the morning Snellgrove was murdered. In fact, Sitz stated that he did not know Gissendanner other than seeing him in the county jail. Sitz, instead, testified only to a statement that Buster Carr made regarding Snellgrove. Specifically, Sitz stated that Buster Carr said:

> "[I]f they wanted to find Mrs. Snellgrove's body ... she would be over there at Ewell in a--you know, by a pond, covered up with brush."

(Record on direct appeal, R. 1356.) Gissendanner was the only witness who testified at trial as to Gissendanner's whereabouts and activities the morning Snellgrove was murdered. In other words, it is apparent that Gissendanner's trial counsel's lack of pretrial investigation required trial counsel to rely solely on Gissendanner to convey to the jury his alibi defense.

As in Bryant and Code, however, there existed easily discoverable witnesses who could have testified as to Gissendanner's whereabouts and activities the morning Snellgrove was murdered. As the circuit court explained in its order granting Gissendanner Rule 32 relief, there were several witnesses who "had important evidence they were

willing to share that trial counsel could easily have discovered to discredit the State's case and to support Gissendanner's defense" (C. 1123-24); namely, Joshua Anton Gissendanner, Rebecca Gissendanner, Olympia Gissendanner, Charles Brooks, Kim Gissendanner, and David Brown. Their testimony, as presented during the Rule 32 hearing, although conflicting with Gissendanner's testimony in some respects, told a cohesive, credible version of the events of the morning Snellgrove was murdered and called into question the State's evidence supporting Gissendanner's guilt.

The main opinion summarizes the information Joshua Anton Gissendanner, Rebecca Gissendanner, Emmanuel Gissendanner, Sr., and Pastor David Brown could have provided to Gissendanner's trial counsel, if trial counsel had interviewed them, as follows:

> "At the postconviction evidentiary hearing, Anton testified that on the morning of the day the State alleges that Snellgrove was murdered he drove to his parents' house at around 7:00 a.m. to check his mail. On the way there, he said, he saw Buster Carr in Snellgrove's car. His father was getting ready for work when he arrived at his parents' house, and he saw Gissendanner and gave him a cigarette. When he came back to his parents' house after dropping his daughter at school, he said, he and Gissendanner smoked some marijuana. While he and Gissendanner were at his parents' house Buster

drove Snellgrove's car into the yard. He said that Buster gave Gissendanner money and Gissendanner gave him drugs. Buster left and came back a little while later and asked if Gissendanner would let him pawn Snellgrove's car in exchange for drugs.

"....

"At the postconviction evidentiary hearing Rebecca testified that she found a pile of Gissendanner's clothes in the bathroom of her house on the day the State alleges that Snellgrove was murdered and that she put those clothes in a basket on her front porch. The clothes, she said, disappeared when Gissendanner was in Montgomery; thus, she surmised, Gissendanner could not have put the clothes in the abandoned trailer.

"....

"At the postconviction evidentiary hearing, Gissendanner's father testified that on the morning the State alleges that Snellgrove was murdered he got up about 7:00 a.m. and went to check on his handicapped brother, who lived with his family. When he went through the kitchen, he said, he saw Gissendanner getting a glass of water. His other son, Joshua, was sitting in his car and smoking a cigarette. He further testified that he saw a white Oldsmobile automobile stopped at a stop sign by his house, and Buster Carr was hanging out of the window of that car.

"....

"Brown testified at the postconviction hearing that he was a pastor and a yardman, that Gissendanner's family attended his church, and that he worked on Snellgrove's yard before her death. He testified that Gissendanner went with him to do work at Snellgrove's on one or two occasions. Over objection, Brown also testified that he overheard

> Buster Carr say that he had done tree work for Snellgrove. Brown further testified that there was another car in the neighborhood like Snellgrove's car."

___ So. 3d at ___. Had trial counsel interviewed these witnesses, trial counsel would not have been forced to rely solely on Gissendanner to convey to the jury his alibi defense. These alibi witnesses clearly had information beneficial to Gissendanner's defense, and it was "unreasonable for counsel not to try to contact the witnesses and 'ascertain whether their testimony would aid the defense.'" Bryant v. Scott, 28 F.3d at 1415 (quoting Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991)).

Although I recognize that the main opinion points to discrepancies between Gissendanner's recollection of events and his alibi witnesses' recollection of events,[14] I am not persuaded to conclude, as the main opinion does, that those discrepancies render moot Gissendanner's trial counsel's duty to investigate those alibi witnesses. In fact, had trial counsel interviewed these alibi witnesses trial counsel could

[14]There is no discrepancy or conflict, however, between Gissendanner's trial testimony and his father's Rule 32 testimony.

have used those witnesses to convey Gissendanner's alibi defense without having to call Gissendanner to testify during the guilt-phase of trial, which would have avoided having to also concede to the jury that Gissendanner "sold drugs" and had previously been convicted of five felony offenses--facts that undermined Gissendanner's credibility and, in turn, undermined Gissendanner's sole defense.

Moreover, the importance of contacting alibi witnesses in this case to convey Gissenanner's sole defense--rather than solely relying on Gissendanner--is highlighted by the State's cross-examination of Gissendanner, in which the prosecutor questioned Gissendanner as follows:

> "[Prosecutor]: We can also agree that your father is a fine man, right?
>
> "[Gissendanner]: Yes, sir.
>
> "[Prosecutor]: But he's not testifying today, is he, you are?
>
> "[Gissendanner]: Right.
>
> "[Prosecutor]: <u>This is your story</u>?
>
> "[Gissendanner]: Yes, sir.
>
> "[Prosecutor]: So <u>it's your credibility that matters, isn't it</u>?
>
> "[Gissendanner]: Yes, sir.

"[Prosecutor]: Now, you said that you don't swear?

"[Gissendanner]: Right.

"[Prosecutor]: What did you mean by that?

"[Gissendanner]: I don't swear to the thrown [sic] of God, under the seat of God.

"[Prosecutor]: But you do deal in drugs?

"[Gissendanner]: Right.

"[Prosecutor]: You are a convicted felon, right?

"[Gissendanner]: Yes, sir.

"[Prosecutor]: As a matter of fact, you have five prior felony convictions, don't you?

"[Gissendanner]: It depends on--what are they?

"[Prosecutor]: You have four convictions of forgery in the second degree.

"[Gissendanner]: Yes, sir.

"[Prosecutor]: Is that correct?

"[Gissendanner]: Yes, sir.

"[Prosecutor]: And a conviction of possession of a controlled substance, cocaine?

"[Gissendanner]: Yes, sir.

"[Prosecutor]: So, you don't enjoy the same reputation that your father does, do you?

"[Gissendanner]: Pretty much. I look up to him.

"[Prosecutor]: But do people look up to you?

"[Gissendanner]: Some.

"[Prosecutor]: Who would that be, people that you buy drugs from or sell drugs to?

"[Gissendanner]: Family members."

(Record on direct appeal, R. 1412-13 (emphasis added).) The State throughout its cross-examination continued to dwell on the fact that Gissendanner both used and sold drugs.

Gissendanner's trial counsel's failure to interview potential alibi witnesses cannot reasonably be said to be the result of a strategic decision.

> "In assessing an attorney's performance, courts must be 'highly deferential,' and 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."' Id. at 689, 104 S. Ct. at 2065 (citing Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)).
>
> "In the context of defense counsel's duty to investigate, 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' 466 U.S. at 690–91, 104 S. Ct. at 2065–66. The reasonableness of counsel's actions may be affected by the defendant's

actions and choices, and counsel's failure to pursue certain investigations cannot be later challenged as unreasonable when the defendant has given counsel reason to believe that a line of investigation should not be pursued. Id. at 691, 104 S. Ct. at 2066.

"....

"'... [T]he Supreme Court certainly did not intend the Strickland analysis to be a total barrier to relief.' Id. at 1391. Where the deficiencies in counsel's performance are severe and cannot be characterized as the product of strategic judgment, ineffectiveness may be clear. Thus, the courts of appeals are in agreement that failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness. See, e.g., Sullivan, 819 F.2d at 1391-92 (perfunctory attempts to contact witnesses not reasonable); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (counsel's performance fell below competency standard where he interviewed only one witness); Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985) ('[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.'); Crisp v. Duckworth, 743 F.2d 580, 583 (7th Cir. 1984), cert. denied, 469 U.S. 1226, 105 S. Ct. 1221, 84 L. Ed. 2d 361 (1985) ('Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation.'); Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984) (investigation consisting solely of reviewing prosecutor's file 'fell short of what a reasonably competent attorney would have done'); see also United States v. Debango, 780 F.2d 81, 85 (D.C. Cir. 1986) (suggesting that ineffectiveness shown by complete failure to investigate but finding no prejudice in case before it).

> "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made. See Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2065–67; see also Debango, 780 F.2d at 85 ('The complete failure to investigate potentially corroborating witnesses ... can hardly be considered a tactical decision'); Sullivan, 819 F.2d at 1389; Nealy, 764 F.2d at 1178; Crisp, 743 F.2d at 584."

United States v. Gray, 878 F.2d 702, 710-11 (3d Cir. 1989) (emphasis added).

Here, although Gissendanner's sole, plausible defense in this case was an alibi defense, Gissendanner's trial counsel did not conduct an investigation into this line of defense. Gissendanner's trial counsel, instead, completely failed in their duty to speak to easily discoverable witnesses who could have conveyed to the jury a cohesive, credible alibi defense. The main opinion, somewhat illogically, concludes that if trial counsel had spoken to those witnesses trial counsel could have made strategic decisions to not present their testimony because, the main opinion contends, their testimony and Gissendanner's testimony conflicts in some aspects.[15]

[15]To reach this conclusion the main opinion must assume that trial counsel knew that the alibi witness testimony

Unlike the main opinion, I cannot fathom any "reasonable, strategic decision" that trial counsel could have made to both forgo their investigation into the only plausible line of defense and to rely solely on Gissendanner to convey his alibi defense, subjecting Gissendanner to cross-examination in which he was forced to admit that he is both a drug dealer and five-time convicted felon--a concession that undermined his credibility and, in turn, undermined his alibi defense.[16] Trial counsel's inaction is particularly egregious given that his client had been charged with capital murder and the State

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would, in some respects, be in conflict with Gissendanner's testimony. Of course, the evidence presented at the evidentiary hearing established that Gissendanner's trial counsel did not speak with those potential witnesses and, therefore, could not have known the substance of their testimony. Although we are directed to avoid using hindsight in judging trial counsel's actions, we must also be careful to not uphold trial counsel's actions by attributing to counsel the clairvoyance that would be required to make a strategic decision in a situation where he or she had no knowledge on which to base such a strategic decision.

[16]I am greatly concerned that the main opinion's use of Gissendanner's trial testimony to conclude that his trial counsel was not ineffective puts Gissendanner's Fifth Amendment right to remain silent at odds with his Sixth Amendment right to adequate counsel. In effect, the main opinion uses Gissendanner's trial testimony--which would not have occurred but for trial counsel's ineffectiveness--to hold that trial counsel were therefore not ineffective. At a minimum, this holding is on shaky constitutional ground.

was seeking to impose the death penalty--a punishment that is "different in kind from any other punishment imposed under our system of criminal justice," Gregg v. Georgia, 428 U.S. 153, 188 (1976), and, as Judge Burke correctly explains, "once carried out, is not modifiable or revokable in this life." ___ So. 3d at ___ (Burke, J., dissenting).

Thus, I agree with the circuit court's conclusion that Gissendanner satisfied the first prong of Strickland.

II. Prejudice

Under the second prong of Strickland the petitioner must establish prejudice; that is, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Here, the circuit court concluded, under the first prong of Strickland, that Gissendanner's trial counsel failed to investigate Gissendanner's sole line of defense. In determining whether Gissendanner's trial counsel's failure to

investigate Gissendanner's sole line of defense resulted in prejudice, the circuit court found, in part, as follows:

> "Beginning with the opening statement, the State argued that Gissendanner lived in the abandoned trailer in Johntown where victim's possessions were found. See, e.g., Trial Tr. at 824:10-22 ('They [victim's possessions] were found with his clothes, some of his personal effects'). The State's witnesses testified about the victim's items and Gissendanner's clothing being collected together. Id. at 1183:22-1184:18. And the State argued in closing that Gissendanner's possessions were found along with the victim's in the abandoned trailer. Id. at 1519:8-14, 1525:10-14. The defense did not challenge and discredit this allegation, which connected Gissendanner with items that had likely been with victim at the time of her murder, such as her purse and its contents.
>
> "Had defense counsel spoken with Gissendanner's family and neighbors and reviewed documents available to them, they would have been able to offer evidence tending to create a reasonable doubt in the state's theory that Gissendanner stayed in the trailer. For example, Gissendanner's brother would have been able to offer testimony that Gissendanner did not reside in the trailer. See Hr'g Tr. at 197:30-199:3 (testimony that Gissendanner was staying at his girlfriend's trailer at the time of victim's death); see Hr'g Ex. 33A (showing that girlfriend's trailer on map of Johntown).
>
> "....
>
> "The theft of the victim's Oldsmobile car was a possible motive for Gissendanner to murder the victim. The fact that her car was stolen was proven without dispute. It was also undisputed that Gissendanner had previously been to the victim's house with Pastor David Brown to perform yard care.

However, had defense counsel interviewed Pastor David Brown, they would have been able to undermine this theory through evidence that Gissendanner could not have seen the Oldsmobile at the house, as it was always locked in the garage underneath the home in the garage basement. See Hr'g Tr. (D. Brown) at 155:3-156:7 (Oldsmobile always locked under house in garage); see id. at 159:13-16; 159:24-160:6.

"....

"... Had they spoken with Pastor Brown, defense counsel could have discredited the State's theory that Gissendanner had seen the victim's car while working at her house and returned to steal the car. This evidence would have tended to create reasonable doubt in the State's theory of a motive to commit the murder.

"In order to try to establish a timeline and means for the crime that could implicate Gissendanner, the State attempted to prove that Gissendanner arrived early Friday morning at the victim's home, found her outside on the carport, and beat her severely around the head and the neck in the carport and then removed her Oldsmobile from the garage. See Trial Tr. at 825:9-11 ('this man killed Ms. Snellgrove for her car and her money and her body that he abducted.'). There was no evidence of anyone breaking into or being present in the victim's home (see Hr'g Ex. 34 (Preliminary Hearing) at 52:11-16), and the State introduced evidence of a scheduled 8:00 a.m. breakfast at Ann's Restaurant tending to prove the victim would have been in her carport and preparing to drive her car. See Trial Tr. at 887:6-15.

"Because defense counsel failed to investigate, they failed to discover and call at trial alibi witnesses to support their strategy of an alibi defense. Witnesses who would have easily been discovered could have testified that they saw

Gissendanner in Johntown on Friday morning during a period of time in which the crime was shown by the State's evidence to have been committed. There was also evidence that could and should have been discovered through a basic investigation that would have demonstrated to the jury the lack of any physical evidence tying Gissendanner to the crime scene.

"Members of Gissendanner's family were available to testify and would have been able to inform the jury that they saw Gissendanner in Johntown that Friday morning. See Hr'g Tr. (E. Gissendanner Sr.) at 219:6-220:18 (saw Gissendanner at his Johntown house when he woke up at 7:10 a.m.); see also Hr'g Tr. (J. Gissendanner) at 184:18-187:15 (saw Gissendanner at parents' house well before 8:00 a.m., and saw him again after 8:15 a.m., still at the house). Such testimony, in particular that coming from Gissendanner's father--who even the prosecutor described at trial to the jury as a well-respected man (Trial Tr. at 1412:7-8,1413:12-13)--was easily available to defense counsel had they, spoken with these family members, and such evidence would have tended to create a reasonable doubt at trial that Gissendanner was at the victim's home on that Friday morning.

"Moreover, Gissendanner's father and brother, as well as Charles Brooks (another Johntown resident) saw Buster Carr and not Gissendanner driving the victim's Oldsmobile into Johntown on the morning of June 22, 2001, which further supports Gissendanner's alibi defense. See Hr'g Tr. (E. Gissendanner Sr.) at 218:26-229:21 (testimony re seeing Buster Carr in a white car in Johntown at 7:10 a.m. on Friday, June 22,. 2001); Hr'g Tr. (J. Gissendanner) at 176:20-195:21 (testimony re seeing Buster Carr several times in Johntown in the white car); Hr'g Tr. (C. Brooks) at 468:3-469-11 (testimony re seeing Buster Carr in white sedan on Friday morning around 7:00 a.m.).

"....

"The State's evidence tended to prove that the victim's body was placed inside the Oldsmobile trunk, after which he drove toward Johntown at around 6:45 in the morning. See Trial Tr. at 819:21-24. One of the most important pieces of the State's case was the testimony of Shirley Hyatt that, while on her way to the Friday morning garage sales, she had seen an unidentified black man, near the victim's home, driving a white Oldsmobile with a dark top. See Trial Tr. at 892:2-893:8. This was the only evidence that put Gissendanner in the vicinity of the victim's home. Furthermore, it was the only evidence tending to show that the car was stolen by a black man rather than a white Buster Carr. The easily discoverable and very available testimony of Pastor Brown who, from this court's observation makes a very credible witness, would have been critical evidence tending to create a reasonable doubt of Gissendanner's guilt. This is particularly true when it is considered that Hyatt had never identified the driver to be Gissendanner. See Trial Tr. at 900:8-10 ('Q: Do you see this person here in the courtroom at all? A: I couldn't tell you.'). Had defense counsel interviewed State's witness Pastor Brown during the times he tried to speak with them, they would have learned that Brown could have and would have testified that another black man had been seen in the victim's neighborhood driving the same type of Oldsmobile car. See Hr'g Tr. (D. Brown) at 167:6-168:7 (saw a black man driving by in a car 'just like hers' two times when he was working at the victim's home).

"As previously noted, had defense counsel interviewed Gissendanner's father and brother about the days in question, they could have introduced credible alibi testimony at trial that Gissendanner was in Johntown at his parents' home in the morning of Friday, June 22, 2001. See Hr'g Tr. (E.

Gissendanner Sr.)at 219:6-220:18 (saw Gissendanner at his Johntown house when he woke up at 7:10 a.m.); see also Hr'g Tr. (J. Gissendanner) at 184:18-187:15 (saw Gissendanner at parents' house well before 8:00 a.m., and saw him again after 8:15 a.m., still at the house.). These times provide an alibi for Gissendanner during the time when witness Shirley Hyatt first told the police she had seen a black man driving a white and black car.

"....

"Furthermore, from a basic investigation and interview of readily available witnesses defense counsel could have presented testimony that several persons in Johntown saw another person, Buster Carr, driving the victim's car in and around Johntown that morning, and such testimony from these witnesses would have further discredited Hyatt's testimony and tended to create reasonable doubt with the jury.

"....

"A reasonably basic investigation would have undercut the State's proposition that Gissendanner's clothing found at the abandoned trailer, with victim's blood found on one sock, proves his guilt. This evidence was very condemning because the natural inference to be drawn from this evidence was that Gissendanner had physical contact with the victim. Other than a fingerprint in the car Gissendanner admitted to driving and another inked fingerprint Gissendanner admitted to placing at the teller's request on the check that he cashed, the only physical evidence the State presented tying Gissendanner to the crimes of which he was accused was this sock on which the State alleged a drop of the victim's blood had been found, and the State relied heavily on this sock. See, e.g., Trial Tr. at 1282:8-1286:14; 1491:12-24. Because the drop of blood on the sock was essentially the State's entire physical evidence case against Gissendanner, defense

counsel was particularly obligated to investigate that sock and to challenge and discredit wherever and however legally possible the State's theories regarding this piece of evidence. Reasonably effective defense counsel who had conducted a basic investigation could have discredited the State's proposition that the sock proved Gissendanner's guilt. This would have tended to create a reasonable doubt of Gissendanner's guilt.

"Defense counsel would have discovered evidence tending to create a reasonable doubt through a basic factual investigation questioning how the sock came to the police's attention. While the victim was still missing, late in the evening of Saturday, June 23, 2001, police had searched the abandoned trailer and found some of the victim's possessions in a white bucket (next to a shirt, pants, and bed sheet never tied to Gissendanner). See Hr'g Ex. 83 at 004-1390-93. As defense counsel did point out through one of their two supporting witnesses at trial, the clothing (which included the sock) was not found until a return trip to the abandoned trailer on Tuesday, June 26, 2001. See Trial Tr. at 1345:1-1350:19; 1350:22-1351:4. However, defense counsel failed to investigate any further this unexplained appearance of the clothing.

"While the officer at trial testified in August 2003 that he found the clothing in the trailer's bathroom (see id.), a review of the police documentation from 2001 shows that the clothing was actually recovered from the front porch of the trailer. See Hr'g Ex. 81 (list of evidence collected on June 26, 2001, at 2:00 p.m., documenting that clothing and shoes were collected from front porch); see also Hr'g Ex. 9 at. 100-204 (police map of trailer, showing presence of shirts, shoes, underwear, and pants on the front deck of the trailer). Had they investigated further, defense counsel could have explained, to the jury that

someone other than Gissendanner had to put the clothes at the trailer.

"Had they spoken with Gissendanner's mother, [Rebecca Gissendanner,] defense counsel would have learned that she remembered finding those clothes on the bathroom floor of her house days before they arrived at the trailer, and that she placed the clothes in a hamper on her unenclosed front porch. See Hr'g Tr. (R. Gissendanner) at 274:6-9 (recognizing the clothing in evidence at trial, 'I knew that was the clothes that I had took out the bathroom, and put on my front porch because they were wet. And the pants and stuff that they brought out, I recognized it.'). Id., at 275:18-276.7.

"....

"... Gissendanner's mother would have further explained that she put the clothing in a hamper on the porch before she left with her husband to pick up Gissendanner from Montgomery and bring him back to Ozark so he could turn himself in for questioning relating to the Oldsmobile he had been driving. Id. at 274:10-275:1. When Gissendanner's parents picked him up, they went straight to the police station in Ozark, and Gissendanner had no access to the clothing on his parents' porch before he turned himself in. Id. at 275:2-17 (parents took Gissendanner straight to police station); see also Hr'g Tr. (E. Gissendanner, Sr.) at 246:19-25 (did not stop between Montgomery and police station).

"If this seemingly credible testimony were believed, someone other than Gissendanner took and handled the clothes and then placed them on the front porch of the trailer crime scene where they would have been, and in fact were, easily found. But, because defense counsel had not investigated and spoken with Gissendanner's family, they were not able to bring to the jury's attention the fact that someone else had placed that clothing at the trailer

to be found by the police, and that the same someone could have tampered with any of that clothing, including the sock later found to have a drop of blood. This would have supported Gissendanner's defense that another was guilty of the crime, and it would have tended to create a reasonable doubt as to his guilt. Yet, defense counsel failed to perform the most basic of factual investigations by interviewing Gissendanner's family with whom he lived. Id. at 268:18-269:23.

"....

"During opening statements, defense counsel asserted that Gissendanner would be raising an alibi defense: '[t]he evidence that we will present at the end of the State's case will show you that not only ... that Emanuel Gissendanner didn't do this, he couldn't have done it.' Trial Tr. at 826:20-24. Defense counsel then informed the jury that Buster Carr was the man who gave Gissendanner the victim's car. Id. at 827:23-828:25. Defense counsel, however, was ineffective in assisting Gissendanner in presenting these defenses. Despite the fact that there was substantial credible evidence which would have been discoverable through a reasonable basic investigation, the only evidence presented to establish Gissendanner's alibi was Gissendanner himself. Defense counsel failed to develop or support their theories of defense that Gissendanner had an alibi, that Buster Carr was the individual, that gave him the victim's car, and that Buster Carr was the more likely suspect.

"....

"Through reasonably effective assistance of counsel a basic investigation would have revealed that Buster Carr worked as a professional tree trimmer. See Hr'g Tr. at 225:17-18 (Emanuel Sr.'s Testimony: 'They [Buster and his brother] were tree trimmer or tree cutters. They cut down trees for a

> living'). And it would also have disclosed that Buster had recently cut some, trees for the victim. See Hr'g Tr. (D. Brown) at 163:7-15.
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> "....
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> "A presentation of this evidence to the jury would have tended to create a reasonable doubt of Gissendanner's guilt. Had defense counsel interviewed Gissendanner's brother and other Johntown residents, they would have learned that after purchasing his drugs in Johntown, Buster was known to smoke his crack cocaine at the end of Crittenden Street on the path up from Gunter's Pond, where the victim's body was discovered. See Hr'g Tr. (J. Gissendanner) at 193:17-194:18 (testimony that he had personally followed Buster down Crittenden Street and observed him smoking crack cocaine there). Joshua Gissendanner would have told them that he saw Buster Carr early Friday morning drive toward Crittenden Street, and that he was driving the victim's car and being followed by two other men in a white work truck. Id. at 183:11-21.
>
> "....
>
> "... See also id. at 183:22-184:15 (describing direction cars were going). Moreover, during the several times that morning that Buster reappeared seeking drugs, he then was seen heading back toward Crittenden Street. Id. at 192:11-20. Had defense counsel interviewed Gissendanner's brother, he could have been called to testify to this evidence, which would have tended to create a reasonable doubt of Gissendanner's guilt."

(C. 1127-74.) Thus, the circuit court found that if trial counsel had interviewed Emanuel Gissendanner, Sr., Joshua Anton Gissendanner, Rebecca Gissendanner, and Pastor David

Brown--all of whom the circuit court deemed to be credible witnesses--Gissendanner's trial counsel could have undermined the State's theory of the case, the State's theory of Gissendanner's motive to murder Snellgrove, and the State's timeline of events surrounding Snellgrove's death, and could have more effectively pointed to Buster Carr as the individual who murdered Snellgrove. The circuit court further found that the presentation of this alibi testimony would have tended to create a reasonable doubt as to Gissendanner's guilt. In other words, the circuit court found that the evidence presented at the Rule 32 hearing was so compelling and credible that it concluded that "there [was] a reasonable probability that, but for counsel's [failure to interview Gissendanner's alibi witnesses], the result of the proceeding would have been different"--that is, "a probability sufficient to undermine confidence in the outcome" of the proceeding--a finding that this Court cannot take lightly.

Because the circuit judge who presided over Gissendanner's Rule 32 petition also presided over Gissendanner's trial, this Court must afford his finding as to prejudice "considerable weight." See State v. Gamble, 63 So.

3d at 721 (affirming the circuit court's grant of Gamble's postconviction ineffective-assistance-of-counsel claim applying the "considerable weight" standard) (citing Francis v. State, 529 So. 2d 670, 673 n.9 (Fla. 1988) ("Postconviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight.")); see also Washington v. State, 95 So. 3d at 53 (affirming the circuit court's denial of Washington's postconviction ineffective-assistance-of-counsel claim applying the "considerable weight" standard). We must give appropriate deference to the circuit court's finding of prejudice because the circuit court is in a far better position than is Court--looking at a cold record--to determine the true prejudicial effect the alibi witnesses would have had on the outcome of this proceeding. Specifically, the circuit court was in a better position to see the presentation of the evidence during the trial, to see the demeanor of the witnesses at trial, to assess the credibility of the witnesses at trial, to see how the testimony and evidence were received by the jury at trial, to see the demeanor of the alibi witnesses presented at the Rule 32 hearing, to assess the

credibility of those witnesses, and, consequently, to assess how that evidence, if presented to a jury, would have affected the outcome of the proceedings.[17]

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[17]Here, as explained above, as in Gamble, Washington, and Francis, the circuit court judge presided over both Gissendanner's trial and his postconviction proceedings. Additionally, just as in Gamble, Washington, and Francis, the circuit court judge in this case is in a far better position than is this Court to determine whether Gissendanner's trial counsels' deficient performance resulted in prejudice. This is especially true given that the circuit court's finding of prejudice during the guilt phase of trial necessarily requires that court to determine prejudice based on factors familiar only to that circuit court judge. For example, the guilt-phase-prejudice determination requires that the circuit court decide what effect, if any, trial counsel's errors would have on a jury comprised of individuals from the circuit in which that judge presides. That determination can only be made by a judge that has great familiarity with how a jury in his or her circuit would respond if counsel had not acted deficiently. This Court, reading only a cold record, cannot substitute its judgment for that of the circuit court when that court determines that there exists a "reasonable probability" that the outcome of the proceedings may have been different if--as is the case here--trial counsel had presented certain evidence to a jury comprised of individuals from that judge's circuit.

Additionally, as a former trial judge, I both presided over and granted postconviction relief in death-penalty cases. See, e.g., Gamble, supra; see also State v. Cothren (CR-00-0729, September 24, 2002) (Order Dismissing Appeal) (Cothren was convicted of capital murder and was sentenced to death, see Ex parte Cothren, 705 So. 2d 861 (Ala. 1997); the State appealed the granting of postconviction relief to Cothren, but while his case was pending appeal in this Court, Cothren died and the State moved to dismiss its appeal as moot). I do not believe that this Court should take lightly a circuit court's

Under the prejudice prong of Strickland, it is not Gissendanner's burden to show that he would have actually been acquitted; instead, his burden is to show only that there is a "reasonable probability" that the result of the proceeding would have been different. Based on the circuit court's findings, and giving "considerable weight" to those findings, I agree with the circuit court's conclusion that, but for Gissendanner's trial counsel's failure to investigate his alibi defense, "there is a reasonable probability that ... the result of the proceeding would have been different." Strickland, supra.

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decision to set aside a jury verdict and death sentence when that circuit judge presided over both the trial and postconviction proceedings and concluded that trial counsel's deficient performance resulted in prejudice. Thus, I believe that the circuit court's finding of prejudice is entitled to "considerable weight," regardless of whether prejudice resulted from deficient performance during either the guilt phase or penalty phase of trial.

Moreover, even without giving "considerable weight" to the circuit court's finding of prejudice in this case, I would conclude that Gissendanner satisfied his burden of demonstrating that there is a "reasonable probability" that the result of the proceedings would have been different if his trial counsel had not been deficient.

Accordingly, I respectfully dissent.[18]

Burke, J., concurs.

[18]As noted in the main opinion, the circuit court granted Gissendanner postconviction relief as to several of the claims raised in his Rule 32 petition. Although I agree with the circuit court's conclusions as to several of those claims, because the circuit court correctly determined that Gissendanner's trial counsel were ineffective for failing to investigate Gissendanner's sole, plausible line of defense it is unnecessary to address those claims.